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SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 109.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

ALPHONSINE McGREW,

Defendant in Error.

In Error to the Supreme Court of the State of California.

BRIEF OF THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
FREDERICK D. McKENNEY,
WILLIAM H. CHICKERING,
WARREN GREGORY,

Of Counsel.

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In the Supreme Court of the United States.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Plaintiff-in-Error,

against

ALPHONSINE McGREW,
Defendant-in-Error.

BRIEF IN BEHALF OF THE PLAINTIFF-IN-ERROR.

I.

Preliminary Statement.

This is an action begun in the State Court of California on a life insurance policy issued by the plaintiff in error in Hawaii to Henri G. McGrew, now deceased. The action was brought by Alphonsine McGrew, formerly the wife of Henri, as the beneficiary named in said policy, notwithstanding that in the lifetime of Henri he had divorced her because of her infidelities, and that under the Hawaiian law the divorced wife's personal estate including choses in action such as her inchoate contingent interest in this policy had passed to and become vested in him.

After the death of Henri, the plaintiff in error fully discharged its obligation under the policy now in suit

by paying the full amount thereof together with interest and costs to J. O. Carter, administrator of Henri, who had brought suit and recovered judgment thereon in the Courts of Hawaii for the benefit of the infant son of Henri.

The policy was at all times in Hawaii, and the laws and judges of Hawaii finally decided that the policy belonged to Henri G. McGrew and the estate of Henri G. McGrew, the deceased, in two actions in Hawaii, the first being a divorce action between Henri G. McGrew and Alphonsine McGrew, the second being the suit of Carter, Administrator, *vs.* this Company. The plaintiff in error claims that the legal proceedings in Hawaii, and the payment of the judgment there by it, gave it immunity under the Hawaiian treaty of 1857, and the Faith and Credit Clause of the Constitution of the United States, Art. IV, Sec. I, from being made to pay a second time in California in this suit. The practical result would be that such payment would be for the benefit of the mother when it has already paid for the benefit of the infant son living with her. The Supreme Court of California held otherwise, and writ of error is brought to this Court.

II.

A Chronological Statement of Facts and Proceedings in the Hawaiian and California Courts.

1890, Henri G. McGrew and his wife, Alphonsine McGrew, were domiciled at Honolulu, in the Kingdom of Hawaii.

1892, Sep. 13th. Policy for $5,000 issued by The Mutual

Life Insurance Company of New York upon the life of Henri G. McGrew, the proceeds of said policy being payable "unto Alphonsine McGrew, wife of Henri G. McGrew, in Honolulu, in the County of Oahu, in the said Hawaiian Islands, if living, and if not living, to *his* executors, administrators or assigns."

It is to be noted that Mrs. McGrew's interest was purely contingent on her surviving McGrew.

1894, Feb. 8th. Prior to this date, one Charles L. Carter of Hawaii was duly appointed guardian of the person and property of Henri G. McGrew, then a person *non compos mentis*.

1894, Feb. 8th. Carter, as guardian, filed in the Courts of Hawaii libel, praying for a divorce from said Alphonsine McGrew on account of the adultery of the said Alphonsine, the bill charging her with various acts of adultery in Honolulu and San Francisco at divers times during two years (10 Hawaiian Rep., 481).

1894, Feb. 9th. On this date Carter, Henri G. McGrew and Alphonsine, were domiciled in Hawaii, and personal service was then made on Alphonsine McGrew of process in the divorce action (Record, 29).

The prayer of this libel is, that Alphonsine might be summoned to appear and answer the complaint, and that Henri might be divorced from the bonds of matrimony from the said Alphonsine and that the custody of the child might be awarded to him (Rec. 30).

At the time the divorce suit was commenced in Hawaii and at the time the divorce was granted, the following statute was in force in Hawaii:

> "*When a divorce is decreed* for the adultery, or other offense amounting thereto, of the wife, the husband *shall hold* her personal estate forever, and he shall hold her real estate so long as they shall live, and if he shall survive her, and there shall be issue to the marriage born alive, he shall hold her real

estate for the term of his own life, as a tenant by courtesy; provided that the Court may make such reasonable provision for the divorced wife out of any real estate that may have belonged to her as it may deem proper" (Civil Code, Sec. 1331).

1894, Feb. 21st. Alphonsine McGrew, sometimes known as Sinette McGrew, asks for alimony.

1894, April 5th. Alphonsine leaves Hawaii for California with their minor son, *and at this time her interest in the policy was purely contingent.*

1894, April 11th. Alphonsine demurs to the libel.

1894, Aug. 6th. Demurrer overruled.

1894, Aug. 10th. Alphonsine filed an answer in the divorce case denying the allegations, and it is to be noted that this answer was filed subsequent to her removal to California.

1894, Aug. 24th. Decree of divorce entered as follows:

"It is ordered, decreed, adjudged, and considered by the Court here, that the said libellant, Henri G. McGrew, be, and hereby is, divorced from the bond of matrimony heretofore formed and entered into between him, the said Henri G. McGrew, and her, the said Alphonsine McGrew" (Record, fol. 37).

Alphonsine was then in California, but appealed and continued to fight decree up to January, 1897, when she finally failed (see Record, pp. 10, 24).

This decree changed the title to the policy.

1894, Oct. 22nd. Henri G. McGrew died at Honolulu, never having changed his domicil from Hawaii (Record, page 85).

The Carter Suit in Hawaii.

After the death of Henri G. McGrew, J. O. Carter, the administrator of the estate of Henri G. McGrew appointed in Hawaii, commenced an action in the Courts of Hawaii against The Mutual Life Insurance Company of New York, the plaintiff in error, to recover the proceeds of said policy, claiming the policy as belonging to the estate of Henri (fols. 38 and 15). The Mutual Life Insurance Company of New York appeared in the action and contested it. The Court decided about October 15th, 1895, that the policy belonged to the administrator and that he was entitled to recover from the company, the plaintiff in error, the sum of $5,599.59 (fols. 38 and 15).

The action was founded upon the fact that statute in Hawaii provided that whenever a divorce was decreed for the adultery of a wife, the husband shall hold her personal estate for ever (fol. 39). Carter, the administrator, claimed the beneficial interest of Mrs. McGrew in the policy had passed to Henri G. McGrew upon the rendition of the decree of divorce, and that upon the latter's death it vested in his personal representative (fol. 15 and Opinion Hawaiian Court in appendix to this brief).

The company answered contesting the claim made by Carter, administrator, and claimed that the policy belonged to Alphonsine, the first beneficiary named therein.

Judgment was given for Carter, administrator.

The following questions were reserved by the Circuit Court of Hawaii:

1. Is Alphonsine McGrew a necessary party to this case?

2. Were Henri McGrew and Alphonsine McGrew divorced, and if so, is the decree of divorce still in effect?

3. Is the amount due on Henri G. McGrew's insurance

payable to J. O. Carter, administrator of the estate of H. G. McGrew?

From the judgment an appeal was prosecuted on the Supreme Court of Hawaii, and after an elaborate argument a decision was rendered affirming the judgment (see Carter *vs.* The Mutual Life, 10 Hawaiian Reports, 117).

The Mutual Life Insurance Company then filed a petition for rehearing on which exhaustive oral argument was again heard and a second opinion rendered (Carter *vs.* Mutual Life, 10 Hawaiian Reports, 559), confirming the principles of the first opinion, and deciding, in addition:

1. That the statute was constitutional.
2. That the property rights in the policy were a necessary incident to the divorce decree and passed by operation of law.
3. That the removal of Alphonsine from Hawaii before the rendition of the decree did not take away its operative effect upon her personal estate.

Rehearing was denied, and the Company was, as stated, compelled to pay the amount of the policy with interest and costs and received from the administrator the policy cancelled and receipt in full, and the monies were paid over for the benefit of Henri's son (fol. 15 and Opinion in appendix to this brief).

The Suit in California.

Alphonsine McGrew commenced this action in California, against the Mutual Life Insurance Company of New York, claiming that the same insurance policy belonged to her. An amended complaint was filed August 14, 1895 (Record, fol. 6).

The defendant in its answer at Paragraph VII thereof pleaded the statute of Hawaii, above mentioned, &c., and claimed in said answer that

> "*under and by virtue of the foregoing provision of law 'and decree of divorce'* all rights of the said Alphonsine C. McGrew in and to said policy of insurance *did pass to the said Henri Golden McGrew* and become his absolute property free and clear of any claims of the said Alphonsine C. McGrew, plaintiff herein, whatsoever" (Record, fol. 14).

The answer then sets out the death of Henri McGrew, the appointment of Carter as his administrator, the commencement of the action above mentioned by Carter, administrator, &c., in the Circuit Court of Hawaii to collect on the said policy, the judgment rendered therein in favor of said Carter, administrator, the sustaining of said judgment by the Supreme Court of Hawaii, the denial of defendant's motion for a rehearing and alleges that the said judgment is now final (Record, fol. 15). The answer further sets out that subsequently *the defendant paid to Carter, administrator, the full amount due thereon, namely, $5,599.59*, and received from the said administrator the said policy of insurance duly cancelled.

It is to be observed that the Hawaiian case was finally decided in December, 1896, and afterwards, and in January, 1897, Alphonsine tried to re-open the divorce case in Hawaii (10 Hawaiian Rep., 600) but failed, and *then* proceeded in May, 1897, with the trial of this case.

On the trial of the action in the California Superior Court the defendant there, the Insurance Company, among other things proved the judgment and decree of divorce under the circumstances above set forth as alleged in defendant's answer, the death of said Henri G. McGrew (Record, fol. 38) and offered testimony to prove.

XVII. —"That J. O. Carter, of said Honolulu, is the duly appointed administrator of the estate of Henri G. McGrew, deceased, and that as such administrator he brought suit, after the death of said Henry G. McGrew, in the courts of the Republic of Hawaii, against the said Mutual Life Insurance Company upon the same policy of insurance which is the subject of this suit, and recovered judgment thereon, which judgment was sustained by the Supreme Court of the Republic of Hawaii, and a motion for re-hearing of said cause, made by the said Mutual Life Insurance Company, was denied by the said Supreme Court, and the said Mutual Life Insurance Company of New York, thereupon paid to said J. O. Carter, administrator as aforesaid, the full amount of the $5,000 due by the said company upon said policy of insurance, and the said J. O. Carter thereupon executed to the said company a full receipt and release of all claim on account and by reason of the said policy, and delivered said policy to said insurance company.

The introduction of which said testimony, appearing in the paragraph designated XVII heretofore, was objected to by counsel for plaintiff upon the ground that the same was *incompetent, irrelevant and immaterial*, which said objection was by the court *sustained*, and *an exception* allowed said defendant, which said exception is hereby designated exception No. 1."

The defendant in that action put in evidence the laws of Hawaii as to the effect of a decree of divorce on the wife's property, as above set forth (fol. 39), the opinions of the Supreme Court of Hawaii in McGrew *vs.* McGrew and Carter *vs.* The Mutual Life Insurance Company (fol. 40). The plaintiff called Alphonsine McGrew, as a witness, who testified among other things that she left Honolulu, April 5, 1894 with her minor son (fol. 55), with the intention of living in California (fol. 57); that she did not take the policy of insurance with her, "Mr. Carter had it" (fol. 62).

The Superior Court of San Francisco, after a trial of the case, May 13, 1897, decided on October 11th, 1897,

"That the rights of this plaintiff in and to said policy of insurance and the moneys due thereunder *never passed to said Henri G. McGrew, nor did he ever hold her rights or property in said policy or money, nor did said policy or the money due thereunder, nor this plaintiff's rights therein, ever become the property of said Henri G. McGrew*" (Record, fol. 21).

The Court further decided that

"said plaintiff is entitled to judgment against the defendant for the sum of $5,000" and interest and costs.

Judgment was entered thereon October 11, 1897 against the Mutual Life Insurance Company for $5,935.30 with costs (Record, fol. 22).

The Treaty Provision.

The contracting parties engage, in regard to the personal privileges that the citizens of the United States of America shall enjoy in the dominions of His Majesty the King of the Hawaiian Islands and the subjects of his said Majesty in the United States of America, that they shall have free and undoubted right to travel and to reside in the States of the two high contracting parties, subject to the same precautions of police which are practiced towards the subjects or citizens of the most favored nations. They shall be entitled to occupy dwellings and warehouses, and to dispose of their personal property of every kind and description, by sale, gift, exchange, will, or in any other way whatever, without the smallest hindrance or obstacle; and their heirs or representatives, being subjects or citizens of the other contracting party, shall succeed to their personal goods, whether by testament or *ab intestato*, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective Governments such dues only as the inhabitants of the country

wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the heir and representative, such care shall be taken of the said goods as would be taken of the goods of a native of the same country in like case until the lawful owner may take measures for receiving them.

And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the lands wherein the said goods are.

See 9 U. S. Stat., at L. 977;

Also Treaties and Conventions of the United States, by Haswell, p. 542.

1898, April, Appeal to Supreme Court, Hawaii, submitted. Treaty in force at this time.

1898, July 7th. Hawaiian Annexation Act passed, taking effect August 12, 1898 (volume 2, supplement Revised Statutes of the United States, 1897 to 1899, page 895, 30 U. S. St. at L. 750); 31 U. S. Statutes at large, page 141, and Hawaiian Islands annexed as part of territory of the United States, becoming the "territory of Hawaii."

This Act provided amongst other things as follows:

"The existing treaties of the Hawaiian Islands "with foreign nations shall forthwith cease and de- "termine, being replaced by such treaties, as may ex- "ist, or as may be hereafter concluded, between the "United States and such foreign nations."

"The municipal legislation of the Hawaiian Is- "lands, not enacted for the fulfillment of the treaties "so extinguished, and not inconsistent with this joint "resolution nor contrary to the Constitution of the

"United States, nor to any existing treaty of the "United States, shall remain in force until the Con- "gress of the United States shall otherwise deter- "mine."

1900, Apl. 30. Act passed to provide a government for Territory of Hawaii.

This Act provided, among other things, as follows:

"SECTION 5. That the Constitution, and, except as "herein otherwise provided, all the laws of the "United States which are not locally inapplicable, "shall have the same force and effect within the said "territory as elsewhere in the United States.

"SECTION 6. That the Laws of Hawaii not incon- "sistent with the Constitution or Laws of the United "States or the provisions of this Act shall continue "in force, subject to repeal or amendment by the "Legislature of Hawaii or the Congress of the United "States.

"SECTION 10. That all rights of action, suits at law "and in equity, prosecutions and judgments existing "prior to the taking effect of this Act shall continue "to be as effectual as if this Act had not been "passed."

1901, Feb. 28. Decision in Supreme Court of California.

The language of the statute under which we claim is as follows:

Revised Statutes of the United States, Sec. 709.

"Sec. 709. A final judgment or decree in any suit in the highest court of a State, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity;

or where is drawn in question the validity of a statute of, or an authority exercised under any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity ; *or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error.* The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ.

The Constitutional Provision.

Constitution of the United States, Art. IV., Sec. 1.

"Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Hawaiian Statute as to Common Law.

"The common law of England, as ascertained by "English and American decisions, is hereby declared to "be the common law of the Hawaiian Islands in all cases,

"except as otherwise expressly provided by the Hawaiian "Constitution or laws, or fixed by Hawaiian judicial "precedent or established by Hawaiian national usage, "provided, however, that no person shall be subject to "criminal proceedings except as provided by the Hawaiian "laws."

Laws of Hawaii, 1892, Chap. LVII, Sec. 5.

See also

Civil Laws of the Hawaiian Islands, 1897, Sec. 1109.

On the motion to dismiss in this Court some reference was made to harsh treatment on the part of the husband (which is contrary to the evidence, fol. 56), but this is as uncalled for, so far as the record is concerned, as was the statement of the California Court that the defense "is rather a remarkable one" (fol. 190), and that the evidence as to the wife's adultery was conflicting (fol. 192), or as would be a statement by this plaintiff in error that the defendant had married an actor and gone to France, presumably forever. The testimony introduced by the defendant in error was plainly intended to create an artificial sympathy for the plaintiff. The situation was really this: Henri, presumably while a medical student in Paris, meets Alphonsine there and marries her in 1890. They return to Hawaii, have a child, and she commits adultery several times. Prior to this and some two years after his marriage, he takes out a policy payable to Alphonsine, "wife of Henri C. McGrew," if living, if not living, to his executors, etc. That is, if his *wife* is not living, he was to control it. This policy he kept in his own safe, and Alphonsine told Henri's guardian that it belonged to her husband (Rec., p. 30). Six months after the policy was taken out Henri and Alphonsine came to California for the former's health, and returned to Honolulu in

December, 1893. Then Henri becomes insane, and in February, 1894, his guardian begins the divorce case. Under the law of Hawaii in such case, if the adultery was committed, the wife's contingent interest under the policy would revert to Henri. All parties were then domiciled there and living under these laws. Alphonsine then flees from Honolulu, abducting the child, [for its custody was asked for in the libel (Rec. p. 15)], and is found to have committed adultery, and then Henri dies, leaving the young son. The administrator collects the policy for the benefit of this son. The guilty mother then, after having abandoned the policy in Hawaii, and fled from the jurisdiction of those courts, seeks in the court of another jurisdiction to get for herself also the benefit of insurance her son has already gotten, although by the law of her husband's domicil, who took out and paid for the policy, she has no interest in it, and seeks to mulct this defendant out of $10,000, when Henri only paid for $5,000.

III.

Statement of the Case as Required by Rule 21.

The following statement presents succinctly the questions involved and the manner in which they are raised. The question is whether the decision in the Supreme Court of the State of California was against the title, right, privilege or immunity claimed by the plaintiff in error under the treaty existing between the United States and Hawaii by which it was provided, among other things, "that if a question should arise among several claim-"ants, as to which of them said goods belonged, the

"same should be decided finally by the laws and judges of "the land wherein said goods are" (Rec. p. 111), and connected therewith and as an enlargement thereof the further question whether said decision did not violate Art. IV, Sec. 1, of the Constitution of the United States, in that full faith and credit were not given in California to the Public Acts, Records and Judicial Proceedings of the Territory of Hawaii.

IV.

Specification of Errors.

The following are the errors assigned by the plaintiff in error and upon which it relies for the reversal of this cause (fol. 224).

The said Supreme Court of the State of California erred in giving and entering judgment against the plaintiff in error and in favor of the defendant in error, the ground of such error being that the ownership of the policy upon which said action is based had been decided by the Courts of last resort of Hawaii to be in Henri G. McGrew and by succession in Carter, her administrator, and not in said defendant in error, and therefore the decision of the Supreme Court of the State of California in said action is repugnant to the provisions of the treaty between the United States and the Republic of Hawaii by which it was provided, among other things, "that if a question should arise among several "claimants, as to which of them said goods belonged the "same should be decided finally by the laws and judges "of the land wherein said goods are," and said decision of the said Supreme Court of California deprived this plaintiff in error of a right conferred by said treaty, and as

connected therewith and as an enlargement thereof, that said decision violates the Constitutionof the United States, in that full faith and credit were not given in California to the Public Acts, Records and Judicial Proceedings of the Territory of Hawaii, namely the decrees in the divorce and administrators action, and the public acts in regard to the effect of the divorce decree.

V.

The Federal Questions.

There can be no dispute but that the Federal questions as to the Treaty were, as a matter of fact, fully presented to the courts of California, and opposing counsel do not contend that such questions were not presented. They base their motion to dismiss entirely upon the way the questions were presented, as shown by this record, and claim that they were not presented in such a way that this Court ought to review the action by the State Court of California.

The constitutional question arose pending the decision in the Appellate Tribunal.

POINT I.

The Federal questions were sufficiently claimed in the California Courts by the pleadings, proof, and Assignments of Error in the Trial Court.

In these Points I to V inclusive the proposition is advanced and abundantly supported that the Federal question as to the Treaty was expressly raised from the beginning even though the Treaty ipsissimis verbis was not *expressly* and in or many words mentioned. And further that the pleading of the divorce decree, the judgment in the administration action and the Hawaii Statute, and the testimony and other proceedings in the California case were a sufficient foundation for the application on the appeal by the California Supreme Court of the Constitutional provision, requiring full faith and credit to be given to such judgments and public acts. The most convenient way of demonstrating the above is to consider the successive stages of the litigation in their order, which is done in the following points, taking up in this Point, (1) the pleadings and the evidence and (2) the assignment of error.

The merits of the motion to dismiss cannot be disposed of by the mere application of one or more of the decisions of this Court which cover perhaps only one feature of the case. When the record which we present is illumined by the broad-minded and oft-repeated test announced by this Court, that is, was the mind of the State Court directed to the fact that a right protected by treaty was relied upon, it is impossible to come to any other conclusion than that this Court has jurisdiction.

In the argument presented herein this Court is asked to bear in mind its unanimous statement in French *vs.* Hopkins, 124 U. S., 524, as follows:

"The record fails to show, either *expressly or by im-*
" *plication, that* any 'right, title, privilege or immunity'
" under the Constitution or laws of the United States, was
" specially set up or claimed in either of the Courts
" below."

We maintain that our claim was made expressly and also by implication in the Courts of California, and in considering §709, quoted in Brown *vs.* Massachusetts, 144 U. S., 579, the Court says the objection was not "taken in any " form, either expressly, or *by any possible inference or* " *implication, before* verdict" nor afterwards.

In Butler *vs.* Gage, 138 U. S., 61, this Court says:

"The Supreme Court of the State confessedly went to judgment without any suggestion that a Federal question was presented for its determination, *and not even in the petition for rehearing* was any such question brought to the attention of the Court."

In Sayward *vs.* Denny, 158 U. S., 184, this Court says:

" Or, at all events, it must appear from the record, *by clear and necessary intendment*, that the Federal question was directly involved so that the State Court could not have given judgment without deciding it; that is a definite issue as to the possession of the right must be distinctly deducible from the record before the State Court can be held to have disposed of such Federal question by its decision. (Powell *vs.* Brunswick Co., 150 U. S., 400, 433)."

In Oxley Stave Co. *vs.* Butler, 166 U. S., 653, this Court laid down the following:

" Looking into the record we do not find that any ref-
" erence was made in the Court of original jurisdiction to
" the Constitution of the United States. Nor can it be in-
" ferred from the opinion of the Supreme Court of Mis-
" souri that the Court was informed by the contention of
" the parties that any Federal right, privilege or immu-

"nity was intended to be asserted. For aught that ap-
"pears the State Court proceeded in its determination of
"the cause without any thought that it was expected to
"decide a Federal question."

"If it appeared that the Supreme Court of the State regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, *our jurisdiction could be sustained.* But this does not appear." Page 660.

Submitting this case to the test so outlined, it will be manifest from what follows that it can be readily inferred from the California opinion that that Court was informed by contention of the plaintiff in error that a Federal right was intended to be asserted and denied the right so asserted. It would be preposterous in this case to claim that the California Court proceeded in its determination without any thought that it was expected to decide a Federal question.

The question is, did the party bringing the case here intend to assert below a Federal right?

Michigan Sugar Co. *vs.* Michigan, 185 U. S., 113.

(*1.*) *The Pleadings and Evidence:*

The Supreme Court of California itself construed the *record* as raising a Federal question.

They say:

"The *defense* is rather a remarkable one; it rests upon a decree of divorce rendered by a court of the Republic of Hawaii, a decree which could not have been obtained here; and upon an Hawaiian statute which has no force *except by comity.*"

It is important to note what is meant by "comity." Now in Barnett's Trusts, 1 Ch., 1902, p. 858, Kekewich

J., says, "if a case arises where there is a conflict between the law of two countries on the subject, a more difficult question may have to be decided on the ground of international comity."

And in Fergusson's Will 1 Ch., 1902, p. 486, the Court says: "That results from the rules followed by the comity of nations which we call international law." That is the California court claimed the record raised a conflict of laws and that the Hawaiian laws and the *lex fori* controlled, if at all, on the ground of international comity or international law, rejecting wholly their control by *treaty* which was what was being urged. The *denial* of the *treaty* rights was thus distinct.

This Court has frequently taken jurisdiction where the judgment of a *sister State* is pleaded as *res adjudicata* in the State Court, although *no specification in so many words was made in the pleading that such judgment violates the faith and credit clause of the Constitution, Art. IV.*

That is, the *pleading* was a sufficient compliance with the clause in § 709, "specially set up or claimed." Thus in Bell *vs.* Bell, 181 U. S., 175, the defendant pleaded the judgment for divorce in Pennsylvania, but did not otherwise specially set up or claim any right under Const., Art. IV, *and this Court took jurisdiction.*

The only answer which defendants in error made to Bell *v.* Bell is on page 24 of their brief; in that they say "the mere pleading of a judgment of a sister State might "well be held to be a special setting up of a right under "this particular provision of the Constitution, as the "pleading of it not only necessarily would suggest such a "provision, but could raise no other question. In the case "at bar, the plea of the decree of divorce and the statute "did not necessarily suggest the treaty, nor were they "made competent by the treaty."

But counsel forgets that *the treaty* is as much the supreme law of the land as the Constitution.

In the late case of Sweringen *vs.* St. Louis, 185 U. S., 45, this Court says:

"Nor was any Federal question raised under the third "clause of that section. Under that clause no title, etc., "or authority exercised under the United States, was "specially set up and claimed by the plaintiff, and there "was no decision against any title, etc., specially set up "or claimed by the plaintiff. There was no decision of "any Federal question whatever. *We do not hold it was "necessary to plead the claim in order to show it was "specially set up, but it must have been so referred to and "mentioned as to show that it was present in the minds "of the parties claiming the right, or must have been in "some way presented to the court* (Oxley Stave Co. *v.* "Butler County, 166 U. S., 648; Green Bay, etc. Co. *v.* Pat-"ten Co., 172 U. S., 58; Columbia Water Power Co. *v.* Col-"umbia Railway, 172 U. S., 475; Dewey *v.* Des Moines, "173 U. S., 193, 199). * * *

"It does not appear in the record that any such claim "was made in the trial court *or upon appeal* in the Su-"preme Court of the State".

By parity of reasoning pleading as this company did, the Hawaiian decrees and statute, "it specially set up or claimed" a right under the treaty (which subsequently became a right under the Constitution), and a Federal question was thereby necessarily injected into the record.

The answer further shows that the courts of Hawaii subsequently determined in the action of *Carter, administrator,* v. *Mutual Life Insurance Co.*, 10 Hawaiian R., 117 and 570 (the opinions are submitted herewith as an appendix), that the decree referred to did operate upon the interest of Mrs. McGrew in this very policy of in-

surance, and that the administrator of her former husband's estate was entitled to recover upon it. For that reason the company was *compelled* to pay to him the full amount with interest.

The California Court refused to follow the Hawaiian laws and judges, and decided that Mrs. McGrew *did not* lose her beneficial interest by the divorce proceedings.

Thus the company would be compelled *to pay the same policy twice, though paid for but once*, notwithstanding the treaty, and Constitution properly prevent it.

The effect of this Hawaiian decree upon the property involved and the administrators judgment was *the defense.* The answer shows in detail the facts conferring jurisdiction upon the Hawaiian Courts, and *claims* that by the divorce judgment, which is set out in *hæc verba* Mrs. McGrew had ceased to be the owner of the policy. It alleged, "That "under and by virtue of the foregoing provision of law, "and decree of divorce, all rights of the said Alphonsine "C. McGrew in and to said policy of insurance did pass "to the said Henri Golden McGrew and become his abso- "lute property free and clear of any claims of the said "Alphonsine C. McGrew, plaintiff herein, whatsoever," (Record, fol. 14). The answer also fully pleaded the Carter judgment and payment thereof.

The issues raised by the *pleadings*, thus claimed *broadly* that by the decree of divorce the policy went to the husband, and that by the laws and judges of the land it was finally decided to belong to his administrator.

This is a general claim; it is as much a claim that it passed by reason of *the treaty giving an extra territorial effect to the Hawaiian divorce, and the decree in the Carter case*, as if such statement "*in ipsissimis verbis*" had been directly and positively made. For the same reason, pleading *payment and performance* in pursuance of the *Hawaiian* decision and judgment, is equivalent to claiming that *on account*

of the treaty such payment protected it from further litigation as to the policy. *The California Supreme Court in its opinion virtually states that the defense in California rests upon the Treaty, for it says* (Rec., fol. 190) "the defense is rather a remarkable one; it rests upon "* * * a decree which would not have been ob- "tained here; and upon an Hawaiian statute which has no "force *here except by comity.*"

By thus pleading the *final adjudication of the Court of a foreign country*, involving *the operative effect of* a previous judicial decree and *statute of that country*, the defendant in error necessarily presented to the trial Court a federal question, viz.: a right claimed under a treaty then existing between that foreign country and the United States, and if the decision of the State Court is against that right it is submitted that the federal question is "specially set up or claimed" within the purview of Section 709 Revised Statutes.

For this treaty was "as much a part of the law of every State as its own local laws and constitution."

Hauenstein v. *Lynham*, 100 U. S., 483, 490.

"All treaties made, or which shall be made, under the "Authority of the United States shall be the Supreme Law "of the land; and the Judges in every State shall be bound "thereby, any Thing in the Constitution or Laws of any "State to the Contrary notwithstanding."

Const., Art. VI, § 2.

This Court early held in dealing with a right conferred by treaty that,

"In the construction of that section, the Court has never required that the treaty, or Act of Congress, under which the party claims, who brings the final judgment of a State

Court into review before this Court, should have been pleaded specially, or spread on the record" (Per MARSHALL, C. J.).

Hickie vs. *Starke*, 1 Pet., 98.

It is submitted that this Court has never held that the Federal question must appear in the record by *direct language*. On the contrary:

"The true test is not whether the record exhibits an "express statement that a Federal question was pre- "sented, but whether such a question was decided, and "decided adversely to the Federal right. Everywhere " in our decisions it has been held that we may review the "judgments of a State Court when the determination or "judgment of that Court could not have been given "without deciding upon a right or authority claimed to "exist under the Constitution, laws, or treaties of the "United States, and deciding against that right. *Very "little importance has been attached to the inquiry "whether the Federal question was formally raised.* In "*Crowell* v. *Randall* (10 Pet., 338, 397), it was laid down, "after a review of almost all our previous decisions, 'that " 'it is not necessary, that the question should appear on " 'the record to have been raised, and the decision made " 'in direct and positive terms, *ipsissimis verbis;* but " 'that it is sufficient if it appears by clear and neces- " 'sary intendment, that the question must have been " 'raised, and must have been decided, in order to have " 'induced the judgment."

Murray v. *Charleston*, 96 U. S., 442.

There are many decisions to the effect that "*in some cases*," in order to raise the Federal question, it is necessary to show that the Federal right relied on had by "adequate specification been called to the attention of the State Court." *But those cases are all of them cases in which the Federal question was not "necessarily involved* in the decision."

This distinction must be kept in mind in considering

the authorities. Many cases cited and relied on by defendant in error are cases of that character, and are not in point and are irrelevant to the case at bar.

Some cases calling attention to this distinction are Capital City Dairy Company *vs.* Ohio, 183 U. S., 238, 248, where the rule is stated to be that in cases in which the Federal question is "*not necessarily involved in the determination of the cause*" it is necessary to show that the Federal right relied upon had been by adequate specification called to the attention of the Court and had by it been considered.

Also Green Bay, &c., Canal Co. *vs.* Patten Paper Company, 172 U. S., 58, 68, as follows:

"If it appear, from the record, by clear and necessary "intendment, that the Federal question *must have been* "*directly involved, so that the State Court could not have* "*given* judgment without deciding, it that will be sufficient,"

citing Roby *v.* Colehour, 146 U. S., 153, 159, and other cases. Also Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, on page 142, as follows:

"If the Courts of this country, and especially this "Court, can be supposed to take judicial notice of any- "thing without pleading it specially, it is the Constitu- "tion of the United States. And if the plaintiff and defend- "ant in their pleadings, make a case which *necessarily* "*comes within some of the provisions of that instrument*, "this Court surely can *recognize the fact* without requir- "ing the pleader to say in words: 'This paragraph of the "'Constitution is the one involved in this case.'"

This last case will be again referred to in connection with the Constitutional point raised in this case.

Also on page 68 (172 U. S.) as follows:

"The true and rational rule is, that the Court must be "able to see clearly, *from the whole record*, that a certain

"provision of the Constitution or Act of Congress was "*relied* on by the party who brings the writ of error, and "that the right thus claimed by him was denied" (citing Bridge Proprietors *v.* Hoboken Co., 1 Wall, 143; also Robie *v.* Colehour, 146 U. S., 153, 159, in which it was said that "it must appear from the record of the case "either that the right, so set up and claimed, was expressly "denied, or that such was the necessary effect in law of "the judgment."

If this Federal question is in the record there is jurisdiction, even if the State Court had ignored it in its opinion.

The decision of the alleged Federal question was necessary to the judgment rendered, and hence gives jurisdiction.

Brooks v. Missouri, 124 U. S., 394, 400.
Armstrong *v.* Treasurer of Athens County, 16 Peters, 281, on p. 285.

In Eureka Lake Company *v.* Yuba County, 116 U. S., 410, 415, Mr. Chief Justice WAITE, in delivering the opinion of the Court, states the rule to be that, where the Federal question is raised *in the U. S. Supreme Court*, it is of no importance that "it does not *appear affirmatively* "on the face of the record" that the Federal question was raised, provided "*it is possible its decision was necessa-* "*rily involved in the final order that was made. For* "*this reason* the motion to dismiss is overruled."

In Arrowsmith *v.* Harmoning, 118 U. S., 194, 195, Mr. Chief Justice WAITE, delivering the opinion of the Court, uses the following language:

"This is the first time, so far as the record discloses, "that even the semblance of a Federal right was set up in "the case. * * * The decision, however, *necessarily*

"*involved a denial of the right which was claimed in this* "*way*, and thus we probably have technical jurisdiction. "For this reason the motion to dismiss must be denied."

And this rule is followed where a right is set up under the *third* clause of Section 709 as well as under the *first* and *second* clauses.

"If the record shows, * * * by *clear and necessary* "*intendment*, that the constitutional provision did arise, "and that the Court below could not have reached the con- "clusion and judgment it did reach, without applying it to "the case in hand, then the jurisdiction of this Court at- "taches. * * * It is sufficient to confer jurisdiction "*that the question was in the case*, was decided adversely "to the plaintiffs in error, and that the Court was induced "by it to make the judgment which it did."

Furman *v.* Nichol, 8 Wall., 44, 56.

Reference is also made to the following cases:

Hickie *v.* Starke, 1 Peters, 94;
Martin *v.* Hunter's Lessee, 1 Wheat., 305, 355;
Craig *v.* State of Missouri, 4 Peters, 410.

These cases were cases where a "title" was claimed under a treaty, and it was held sufficient if the record shows a complete *title* under a treaty and that the judgment of the Court is in violation of that treaty.

We claim that the record in our case shows a "complete" *right* under a treaty, and that the judgment of the Court is in violation of that treaty.

See also:

The Mayor, &c., *v.* De Armas, 9 Peters, 224.

Crowell *v.* Randell, 10 Peters, 368, where, between pages

392 and 398, Judge STORY reviews many cases and sums up by saying:

"It is not necessary the question should appear on the "record to have been raised, and the decision made in "direct and positive terms, *ipsissimis verbis;* but that "it is sufficient if it appears by clear and necessary in- "tendment, that the question must have been raised, and "must have been decided in order to have induced the "judgment."

There could be but one reason before the Constitutional provision took effect, why this foreign judgment bound the California Court and why this judgment gave the Insurance Company "immunity," and that was because of the treaty. It is true, this record does not disclose the fact that the Insurance Company *argued* before the trial Court that the evidence was material *on account of the treaty.* It is not necessary that the record should show this. The evidence was offered as being material, and excluded because the Court decided it to be immaterial. It *was* material *because* the treaty, the supreme law of California, of which the Court took judicial cognizance, and subsequently the Constitution *made it material.* The Trial Court could not have decided on the materiality of this evidence without considering and deciding the treaty question. The treaty question was necessarily involved in that decision, and such decision was against this plaintiff in error on the treaty question, and denied to the Insurance Company rights thereunder. By that ruling the California Trial Court decided that the performance of the Insurance Company, in accordance with the treaty, namely, the payment by it under the statute of Hawaii and the judgment of its Court which the Insurance Company claimed should therefore be *final,* was *not final,* and did not protect it from another suit in California. The denial of the treaty right "was the necessary effect in law" of

that decision. Therefore, the Federal question was *necessarily involved* in that decision, and is now before this Court.

Exception was taken to the ruling of the Trial Court. An appeal was taken to the California Supreme Court, and the question of the materiality of this evidence was presented to and argued before the Appellate Court of California.

(3.) *The Assignments of Error on the appeal to the Supreme Court of California* (fols. 70-78).

The findings of the Trial Court and the admitted statement of facts upon which the case was tried, deal wholly with these Hawaiian judgments and Hawaiian law. And the assignment of errors in the California Court (fol. 74) has for its contention the following:

"The said findings of fact do not determine the issues raised by the following allegation in said answer: 'that under and by virtue of the foregoing provision of law and decree of divorce, all rights of the said Alphonsine McGrew in, and to said policy of insurance did pass to the said Henri Golden McGrew, and become his absolute property, free and clear of any claim of the said Alphonsine McGrew, plaintiff herein, whatsoever.'"

And further in the assignment of error, the defendant in that Court, called to the attention of the Appellate Court in subdivision C of the first assignments of error as to the law, that the findings of the Trial Court did not determine the issue, "that the said insurance company had been *com-* "*pelled* to pay to J. O. Carter, as the administrator of the "estate of Henri Golden McGrew, deceased, the full amount "of said policy, and that by said payment, said defendant "discharged all its obligations in said policy to anyone "whomsoever" (Record, fol. 74), and in the first assignment of errors of law covered by exception, the defendant there

called the attention of the Court to the error in excluding evidence of payment to Carter, administrator, of the full amount of the policy (Record, fol. 75).

This was a claim under the treaty, *for by the treaty alone was such effect given to the* determination of the Hawaiian Supreme Court defining the effect of the decree of divorce and the statute in changing the title to the policy of insurance, as warranted the insurance company in claiming that a *California* Court should regard the Carter judgment as one compelling the insurance company to pay, and such payment as one by which the insurance company discharged all its obligations.

This was a claim that the question among several claimants as to which of them the goods belonged, had been decided finally by the laws and judges of the land wherein the said goods were.

This is amply sufficient according to the most recent statement of this Court by Mr. Justice Brown on Jan. 5, 1903, in Johnson *vs.* New York Life, as follows:

"Conceding that it was unnecessary to set it up in any "pleading anterior to the trial, since it could not be "claimed that the right had been denied to her until the "trial took place, it was clearly her duty to make the "claim either on the motion for a new trial or in the as-"signments of error filed in the Supreme Court of the "State. In neither does it appear, nor is there any allu-"sion to it in the opinion of the Supreme Court. It first "appears in the petition for a writ of error from this "Court. This is clearly insufficient."

The main claim of the defendant in error is, that the writ should be dismissed because no federal question was *specially set up or claimed in the trial Court.*

But there is no such narrow holding in this Court. The cases cited by the moving party are either irrelevant or opposed to any such contention. Parmelee *v.* Lawrence, 78 U. S., 38, was a case where the certificate of the

presiding Judge attempted to *originate* the question. Brooks *v.* Missouri, 124 U. S., 394, was a case where no rehearing was involved, as in our case, and held, if decision of federal questions was necessary to judgment rendered, it is sufficient to give jurisdiction. Baldwin *vs.* Kansas, 129 U. S., 57, was a case where the State Supreme Court expressly refused to consider the question because it was not raised at the trial. Brown *v.* Massachusetts, 144 N. Y., 579, simply follows the last case. In Oxley Stave Co. *vs.* Butler Co., 166 U. S., 653, there is nothing opposed to our contentions; on the other hand it favors them as shown above. Water Co. *vs.* Electric Co., 172 U. S., 488, has been considered elsewhere by us and is in our favor. In Chapin *vs.* Fye, 179 U. S., 129, the questions were only raised in the application for the writ of error to this Court.

POINT II.

The Federal questions were, therefore, necessarily involved in the Supreme Court of California on appeal, and were fully presented there by counsel.

All the matter in Point I alleged to have been before the trial Court, including the federal question, was, of course, subsequently before the Supreme Court.

The briefs of the Mutual Life presenting the Federal question will be found at fol. 174, and the clerk of a Supreme Court of California certifies that such briefs, amongst other papers, "is a true and correct copy of recorders "(*sic*) in S F. 1230; McGrew *vs.* Mutual Life, consisting "of pages one to two hundred and twenty-nine—and same "constitute all papers on writ of error in above entitled "cause as shown by the records of my office" (fol. 231).

These briefs support the position taken in Point I in that they are consistent with the claim there made, and in view of their presence, how can it be said, to use the test of this Court elsewhere alluded to, that the mind of the State Court was not directed to the Federal question?

It is no answer for defendant in error to say that they are no part of the record, for although *now* a copy of the *opinion is required* to be incorporated in the transcript by the eighth-rule, and *this court looks at it for a Federal question*, yet this Court has said *it was no part of the record.*

In the brief of the Insurance Company on the appeal to the California Supreme Court this federal contention is made clear, for there it is definitely and distinctly claimed that the evidence of performance, under the decree of the Hawaiian Courts, was material, and such payment was a discharge of all its obligations in said policy *for the reason that "the decree of the Hawaiian Court is binding on ac-* "*count of treaty obligations between the United States* and "that country," and reference is there made to Article VIII of the treaty (see brief of the original defendant, Record, fols. 102, 103).

The language of the brief at fol. 103, after referring (at fol. 102) to the "binding effect of a decree of a foreign Court," as decided in Hilton *v.* Guyot, 159 U. S., 202, is as follows:

"The principle thus laid down in Hilton *v.* Guyot, is especially applicable to an Hawaiian judgment, *on account of the treaty obligations between the United States and that country.* By Article VIII of the treaty, proclaimed November 9, 1850 (Treaties and Conventions of the United States, page 540), of which this Court will take judicial cognizance (Sec. 1875, C. C. P.), it was provided that the rights to the personal property of a citizen of either country should be 'decided finally by the laws and 'Judges in the land wherein the said goods are.' * * *

The judgment of the Court below violates this treaty obligation in that it has not left the decision, as to the ownership of this insurance policy, to the laws and Judges of Hawaii" (fol. 103).

Again in the reply brief of the Insurance Company before the California Appellate Court, its counsel expressly claims rights under the treaty as follows (see fols. 173 and 174): "We contend that respect for the Hawaiian decree *is secured by treaty stipulation*," *citing the terms of the treaty*, and it there claims that the treaty is part of the law of the State of California (fol. 174). The plaintiff in error there states its claim as follows:

"It is not at all material where the policy was at the beginning of this present action, but where it was when the respondent, by appearing in the divorce proceedings, submitted to the jurisdiction of the Hawaiian Court. *To hold otherwise would be to disregard this treaty.*"

"With us a treaty is a part of the supreme law of the land; as such it influences and controls the decisions of tribunals. * * * Nations are bound to maintain respectable tribunals, to which the subjects of States at peace may have recourse for the redress of injuries, and the maintenance of their rights. If the character of these tribunals be respectable, impartial and independent, their decisions are to be regarded as conclusive."

Also, again at folio 178, as follows:

"Therefore, whether the cause of action is to be considered as having arisen when the decree of divorce was rendered, or when the action by the Hawaiian administrator to recover upon the policy was brought, in either case the '*goods*' were in Hawaii."

Counsel for Alphonsine, in their brief before the California Supreme Court, argue at length that the statute of Hawaii and the decree of its Court have no effect extra

territorially and are not binding on the California Court, and *explicitly claim that the treaty does not enlarge such effect.*

Thus in their brief (Record, fol. 147) as follows:

"We do not think that the treaty between the United States and Hawaii helps the appellant. This treaty provides 'that the rights to the personal property of a citizen 'of either country must be decided finally by the laws and 'Judges in the land wherein the said goods are situ-'ated.' This is very strong authority for respondent's contention."

Also in the reply brief of Alphonsine top page 92, fol.) 187), her counsel recognizes the fact that the treaty question was before the California Court, as they there claim that the argument of the insurance company in its reply brief "as to the effect of the treaty is * * * not in point."

Thus there seems to be no question but that the Federal right was necessarily involved in the claim of this plaintiff-in-error, and that the rights of the insurance company under the treaty, and the errors of the Trial Court in its rulings thereon, were fully called to the attention of the Appellate Court in California, and specially set up and claimed there, and were there argued by counsel for both parties and were considered by the Court.

New York Central Railroad Co. *vs.* New York, 186 U. S., 269, 273.

In this case the Court said: "But assuming, without "intimating an opinion to that effect, that the raising of "a Federal question in the brief might be sufficient, it is "well settled in this Court that it must be made to ap-"pear that some provision of the Federal, as distinguished "from the State, Constitution, was relied upon, and that "such provision must be set forth."

This Court should consider the *reasons given* by the plaintiff in error in its brief before the California Supreme

Court for offering in evidence the judgment of the Hawaiian Court and the payment by the company thereunder, and the reasons why they were material as evidence. As we heretofore have shown, the reasons given *to the trial court* for offering this evidence do not appear in the minutes of the trial, and properly so, but on the appeal to the Supreme Court those reasons are stated in the printed brief, being part of the printed record in which it was called to the attention of that Court that *the treaty* made the evidence material.

This shows not only that the State Appellate Court could not escape deciding this treaty question, but it also shows that the treaty question was presented to the *trial Court* and passed on by it when it decided such evidence to be immaterial and excluded it.

POINT III.

The treaty and constitutional point in question were involved in the decision of the Supreme Court of California and apply to this case.

(*a.*) THE TREATY POINT.

In the Supreme Court of California, in one of the briefs filed on behalf of the appellant company April 23rd, 1898 (p. 75), almost three years before the decision of the case by that Court (p. 93), it was contended "that respect for the Hawaiian decree is secured by treaty stipulations, which sometimes smooth the way for the recognition, in doubtful cases, of the effect of foreign judgments upon property rights and interests," and specific reference was

made to the protection claimed under the treaty between the United States and Hawaii of 1849 (p. 85).

The claim of the binding effect of the Hawaiian decree and statutes, and the applicability thereto of the terms of the treaty of 1849, was again reiterated in the petition for a rehearing (p. 103), as shown more fully under Point IV below, and was especially assigned in the petition for the writ of error as ground for its allowance (p. 109).

The decision of the Appellate Court was against this plaintiff in error's claim under the treaty; (See Record, fol. 194).

"The question, therefore is, what was the right of respondent to the property involved at the time when the said statute could be invoked? And it is clear that if at at that time *she was domiciled in California the Hawaiian statute had no operation upon her or her personal property here; for the law which governs personal property is the law of the domicile* (See Whitney *v.* Dodge, 105 Cal., 192, and authorities there cited).

In our opinion the respondent at the time when the Hawaiian statute took effect was domiciled in California."

Also at folio 198 as follows:

"Our conclusion is that at the date of the decree of divorce the respondent was domiciled in California, and had been since she came here in April, 1894; and that *therefore* the *Hawaiian statute under which the forfeiture of her personal property is claimed had no effect upon her or her property in California.*"

Again at folio 198 as follows:

"The Court did not err in excluding evidence of the fact that appellant had satisfied a judgment recovered against it by the administrator of Henri G. McGrew on the policy here sued on, in an action to which the respondent

here was not a party. The fact that appellant paid the policy to the wrong party would be no defense to an action brought by the right party."

Here the California Court distinctly and directly refuses to this plaintiff in error the "immunity" from further prosecution in the Courts of the United States granted it by the treaty, and sustains the trial court in its decision that it would not regard the law of Hawaii and the decisions of its Judges with respect to the ownership of the policy as binding, and that proof of payment and performance of the contract, in accordance with that law and those decisions, were immaterial.

At this point we remind the Court of its very recent case.

In Tullock v. *Mulvane, 184 U. S. 497, Mr. Justice White delivering the opinion of the Court states, pages 503, 504. that it is sufficient if the trial Court and State Appellate Court pass upon the Federal question, and that such passing upon the question "of itself suffices to present the Federal "question, even if it had been otherwise ambiguously "raised on the record."*

Raising the question on appeal is sufficient.

Sweringen *vs.* St. Louis, 185 U. S., 45.

It must be apparent from Points I and II above, and from an inspection of the record, that the decision of the State Courts could not have been reached without the denial of the principal ground of defence pleaded by the defendant, to wit: that the policy belonged to the husband had been adjudicated by the Hawaiian Courts to be goods in Hawaii and to be hisproperty, and that pursuant to the judgment of those Courts the policy *had been* paid to his administrator, such ground resting upon a right, privilege or immunity set up and claimed under the treaty between

the United States and Hawaii. As it is, the judgment of the highest Court of the State denying any such right, privilege or immunity is subject of review in this Court, and as it appears from the record in this case, that the foreign judgment or decree and the foreign statute were not only specially set up or claimed in the trial Court, but their effect under the terms of the treaty was also elaborately argued before judgment and reiterated after judgment in the State Supreme Court, it would seem that the defendant company, plaintiff in error here, had done all that could reasonably be required of it to preserve its right to have the federal question, necessarily and so prominently involved in the case, reviewed by this Court.

It is well settled that the right may be set up either in the Trial Court or in the State Supreme Court. "But the record does not show that the company specially "set up or claimed in the State Courts, *or either of them*, "any right under the Constitution of the United States."

Oxley Stave Co. vs. *Butler Co.*, 166 U. S., 659.

This policy was applied for by the insured in Hawaii, where he and his wife remained domiciled at the commencement of the divorce proceedings; there the first premium was paid, and there the policy first went into effect.

Mutual Life v. *Cohen*, 179 U. S., 262.

The defendant in error was served with summons and libel *in Hawaii;* and she appeared in that action and contested it to the end.

The Hawaiian law then in force provided, that in every case when a divorce was decreed, "for the adultery of the wife, the husband should hold her personal estate forever."

The Hawaiian Court held, in the action of *Carter* v.

Mutual Life, supra (submitted herewith as an appendix), that by the mandatory character of this statute the personal estate of the defendant was a part *of the subject-matter of the suit from its commencement*, and that Mrs. McGrew could not by transferring her domicile to California pending the suit take away anything from the jurisdiction already acquired.

The Supreme Court of California in its opinion held that the statute of Hawaii did not apply until the divorce decree was rendered, and that inasmuch as Mrs. McGrew was domiciled in California at that time, it did not therefore affect her property rights.

The latter Court quite ignored the proposition that Mrs. McGrew had already appeared in the action for divorce, and that the alienation of the wife's personal estate was, under the Hawaiian law, a *necessary incident* of every action for divorce upon the special ground mentioned.

It is claimed that the decision of the Court herein is against a right claimed to be conferred by a treaty existing between the United States and the Republic of Hawaii. Of this treaty this Court will take judicial cognizance (Section 1875, C. C. P.); and it is as much a part of the local law of the State of California as its own Constitution (Hauenstein *vs.* Lynham, 100 U. S., 483). This treaty provided:

"If a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are."

The term "goods" here refers to personal property, which in this case was an insurance policy. This policy was applied for and was delivered by the agent of the company in Honolulu; its premiums were paid there, and

there it took effect. It was, therefore, so far as the three parties to it, namely: the insured, the beneficiary and the company are concerned, an *Hawaiian contract.*

It was in the possession of Carter when the suit was brought in Hawaii, and surrendered up to the company for cancellation after payment.

That under such conditions the domicile of the insurance company, so far as the policy was concerned, was in Hawaii, is directly decided by the Supreme Court in New England Mutual Life Insurance Company *vs.* Woodworth, 111 U S., 138; and that where the first premium is paid and the policy delivered to the insured is the place where the policy takes effect, is also directly decided in Mutual Life Insurance Company *vs.* Cohen, 179 U. S., 262.

When the question arises as to the law which is to govern a particular contract, it is frequently necessary to decide that a chose in action has a *situs.* This may be held to be where the *debtor* resides or where the instrument actually is. The principle that the domicile of the owner controls, is not of universal application, and is never applied when there is an express statutory prohibition to the contrary.

We claim, therefore, that the *situs* of this insurance policy was in Hawaii, and therefore that the courts of that country had the right to finally determine to whom it belonged.

When the divorce action of McGrew *vs.* McGrew was commenced, both parties were domiciled in Hawaii, and Mrs. McGrew was served with process there. She appeared in the action and contested it from its beginning to its end. Her demurrer to the libel having been overruled, she appealed from that opinion directly to the Supreme Court (McGrew *vs.* McGrew, 9 Hawaiian Reports, 475); and another interlocutory order, ordering the

guardian to pay counsel fees *pendente lite* was also appealed from (9 Hawaiian Rep., 426).

After these matters were disposed of by the Supreme Court (the practice of that country allowing an appeal to be taken before final judgment), the case was set down for trial. This trial occupied two days' time; witnesses were produced by both parties, and after the decision granting plaintiff a divorce, an appeal was attempted by the defendant to this Supreme Court. It will thus be seen that Mrs. McGrew unqualifiedly submitted herself to the jurisdiction of the Hawaiian Court, not only by appearing therein, but also by contesting every phase of the litigation.

The effect which these divorce proceedings had upon her personal property rights was thereafter directly brought in issue by the case of Carter, Administrator, *vs.* Mutual Life Insurance Company of New York. This was an action brought upon the same policy of insurance as is now sued upon, and was based entirely upon the proposition that by the divorce the personal property of Mrs. McGrew had passed to her husband. This was a construction by the Hawaiian Court of its own statute and is a decision by the highest Court of that country that the "goods" here in question were not the property of Mrs. McGrew. By the treaty hereinbefore referred to, this decision of the Hawaiian Court is conclusive, and the decision of the California Court being diametrically opposed to the decision of the Hawaiian Court, deprives the defendant company of the right conferred by this treaty to have the question, to whom it owed the policy, determined by the law and judges of the land in which was the *situs* of the policy. This right as conferred by the treaty, has been claimed by the defendant as shown in Point I above. It was, therefore, embodied in the *record* of the case, because it is apparent that

the California Court could not have reached its conclusion without disregarding the judgment of the Hawaiian Court. The Hawaiian Courts decided that this policy of insurance was the property of McGrew's administrator, and the California Court has decided that it was the property of Mrs. McGrew. The conclusion of the latter Court could not have been reached except by holding that the policy was *not* the property of McGrew's administrator.

The first conclusion of law of the trial Court was that this policy of insurance (fol. 11) and the moneys due thereunder never passed to said Henri G. McGrew nor did he ever hold her rights or property in said policy or money.

This is a direct finding and adjudication by the Courts of California, in opposition to the conclusion of the Courts of Hawaii. The finding of the Hawaiian Court was that the rights of the plaintiff in and to this policy of insurance did pass to McGrew's administrator.

We must conclude, therefore, that the decision of the California Court is opposed to the decision of the highest Court of Hawaii concerning the title to property which was within the jurisdiction of the Hawaiian Court, all parties to which were properly domiciled there.

(b) The Constitutional Point.

This Court further has jurisdiction to determine whether the Supreme Court of California should not have applied Sec. 1, Article IV of the U. S. Constitution in regard to full faith and credit.

The applicability of this Constitutional provision is fully set out elsewhere in this brief, Point VI, B. This Court has *power* to consider such question. The treaty point is before it. It is sufficient if the Constitutional point is connected with it or is an enlargement of it.

Thus in Keokuk & Hamilton Bridge Co. *v.* Illinois, 175

U. S., 633, this Court says: "In Dewey *vs.* Des Moines, "173 U. S., 193, it was held that where a Federal question "is raised in the State Courts, the party who resorts to "this Court cannot raise another Federal question, *not* "*connected with it*, which was not raised in any of the "courts below."

In Dewey *vs.* Des Moines, 173 U. S., 193,197, the Court said: "Reference to the opinion of the Supreme Court of "the State shows that it was not therein discussed or de- "cided. If the questions were only *an enlargement of the* "*one mentioned in* the assignment of errors, or if it were "so connected with it in substance as to form but another "ground or reason for alleging the invalidity of the per- "sonal judgment," etc, etc.

In Dewey *v.* Des Moines, the plaintiff-in-error sought to raise a second Federal question, but the basis of this second question was a claim of distinct independent relief, viz., a right to immunity from a special assessment on the ground that such assessment was a deprivation of property without due process of law. The admitted Federal question was the validity of a personal judgment.

In our case, the constitutional point merely adduces another ground for the immunity claimed under the treaty —the two connected points are simply two grounds for the same relief.

The question, being an enlargement of the one before the lower Court, or, even better, being *but another ground* for alleging the invalidity of the decision made by the lower Court, the assignment is sufficient to permit the question to be raised and argued. The Federal question raised in Dewey *v.* DeMoines, as to the assessment upon property was a point totally distinct from the Federal question which was unmistakably raised. The reasoning of the case, however, makes it manifest that if the facts of *that* case had been as the facts in the present are—this Court would not

have refused to permit the other Federal question to be raised.

Had the treaty been given its full force and effect by the California Court, and been properly applied, full faith and credit would have been given to the judicial records and public acts of Hawaii, and the same result would flow from the application of the Constitution.

The Company had the protection of the treaty, and when the Constitution went into effect it had the additional protection of that Supreme Law which was operative in the same general way and on the same general grounds.

Under the treaty this Company claimed protection. Similar protection is claimed by the Constitutional provision which went into effect *after* the case was submitted to the California Court.

The Constitutional point was foreshadowed in our brief in the Supreme Court of California (see Rec., p. 56).

The controlling importance of the treaty *depends* upon the *Constitution* of the United States. Art. VI. is

> "2. This constitution and the laws of the United "States, which shall be made in pursuance thereof, "and all treaties made, or which shall be made, under "the authority of the United States, shall be the su- "preme law of the land; and the judges in every State "shall be bound thereby, anything in the constitution "or laws of any State to the contrary notwithstand "ing."

When the Company claimed the protection of the *Treaty* it claimed the protection of the *Constitution*. When the Constitution was extended to Hawaii while the California Court had the case under advisement, the Constitutional points were added to the Treaty points, by operation of law, for the California Court was bound to take judicial notice of the Constitution as the Supreme Law.

The divorce decree and the administrators' judgment

were pleaded by the Company in the California suit, and as soon as the Constitution was extended to Hawaii the Company was entitled by such pleading to its protection.

As we said above in Point I this Court has frequently taken jurisdiction where the judgment of a *sister State* is pleaded as *res adjudicata* in the State Court, although *no specification in so many words was made in the pleading that such judgment violates the faith and credit clause of the Constitution, Art. IV.*

That is, the *pleading* was a sufficient compliance with the clause in § 709, "specially set up or claimed." Thus in Bell *vs.* Bell, 181 U. S., 175, the defendant pleaded the judgment for divorce in Pennsylvania, but did not otherwise specially set up or claim any right under Const., Art. IV, *and this Court took jurisdiction.*

See also the late case of Sweringen *vs.* St. Louis, 183 U. S., 45, cited above in Point I.

Also Bridge Proprietors *v.* Hoboken Co., 1 Wall., 116, on page 142, as follows:

"If the Courts of this country, and especially this "Court, can be supposed to take judicial notice of any- "thing without pleading it specially, it is the Constitution "of the United States. And if plaintiff and defendant in "their pleadings make a case which *necessarily comes* "*within some of the provisions of that instrument*, this "Court surely can *recognize the fact* without requiring "the pleader to say in words: 'This paragraph of the "'Constitution is the one involved in this case.'"

The record shows that the public acts of Hawaii had an effect there not given them by the California court.

Lloyd *vs.* Matthews, 155 U. S., 227.

POINT IV.

The opinion of the Supreme Court of California impliedly referred to the Federal question. This point, taken in connection with the others showing that the Federal question was sufficiently claimed and set up is conclusive against the motion to dismiss.

The defendant in error claims the words "by comity" in the opinion of the Supreme Court show that the latter were not considering a right claimed under the treaty or Constitution. But it is manifest that just here the Court expressly denied the treaty and constitutional rights of plaintiff in error, The Court, referring to the Hawaiian decree, says it was "a decree which could not have been "obtained here; and rested upon an Hawaiian statute which has "no force here except by comity." That is, the Court recognized that the Mutual Life was claiming that the Carter judgment founded upon the decree of divorce involved necessarily the statute, and that the statute controlled the disposition of the case in California by virtue of the treaty and Constitution, but the Court said no, the statute has no force, by treaty or Constitution but only by comity, and therefore does not affect the result (see also Point I above.)

"Any allusion to it (the Federal question) in the "opinion of the Supreme Court" is sufficient. Johnson *vs.* New York Life, this court, January 5, 1903.

The plaintiff in error claims that by virtue of certain treaty obligations between these two countries and the extension of the Constitution of the United States, the Court of California was obliged to follow the decision of the Court of Hawaii, and that the facts presented show the precise contingency to which the treaty and Constitution

were intended to apply. But it would be immaterial even if the treaty and Constitutional questions were not referred to in the decision of the State Court. A treaty and Constitutional right "may be denied as well by evading a "direct decision thereon as by positive action."

Chapman *vs.* Goodnow, 123 U. S., 540, 548.
Des Moines Nav. Co. *v.* Iowa Homestead Co., 123 U. S., 552, 555.

This case was in form decided below on the question, where are the goods? By deciding that Alphonsine could change her domicil *pendente lite*, with the effect of withdrawing her *choses in action* from Hawaii and the jurisdiction of its Court, the Supreme Court of California decided that the goods were not in Hawaii either when the decree of divorce or the judgment of Carter were obtained.

The contention of the Company was that the goods were in Hawaii at both times, and that because of that fact it was entitled to the benefit of the provision of the treaty; that the rights of the rival claimants should be determined by the law and judges of Hawaii, and to the protecting effect of such determination against a second payment of the policy.

The Supreme Court of California cannot avoid the Federal question by holding that the facts do not present a case within the purview of the treaty. This Court will examine the case to see if the Federal question is really involved, even if it be necessary first to decide the preliminary question, where the goods really were, and where was the *situs* of the policy when the decree of divorce and the Carter judgment were obtained. The case is analogous to one in which this Court will examine the question whether a contract exists, preliminarily to the question

whether or not the obligation of a contract has been violated by a State statute.

It is well settled, that raising the Federal question for the first time in the Appellate State Court, if it be there considered, or necessarily involved in the decision, gives the right of review in this Court.

Missouri Kansas &c., Ry. Co. *v.* Elliott, 184 U. S., 530 (decided March 10th, 1902) where Mr. Justice WHITE, delivering the opinion of the Court, uses the following language, on page 534:

"So controlling as to the existence of the Federal question is the fact that it was actually considered and decided by the state Court, that it has been *held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the state is too late, yet when a question is thus raised and it is actually considered and decided by the state court, the right to review exists.*" *Citing Mallett* v. *North Carolina, 181 U. S., 589, 592.*

In Erie R. R. Company *v.* Purdy, 185 U. S., 148 (decided April 7th, 1902), Mr. Justice HARLAN, delivering the opinion of the Court, says, on page 153:

"If the *highest court* of the state, by *its final judgment,* * * * *denies a right*, privilege or immunity specially set up or claimed *in that court for the first time* under the constitution *or any treaty*, statute or authority exercised under the United States, this court could review that judgment, *although no Federal question was distinctly raised or insisted upon in the trial court.*"

In Maxwell *v.* Newbold, 18 How., 511, 516, the rule is stated to be that although the questions raised and decided in the State Court make no reference to the constitution or laws of the United States, yet "This did not preclude the plaintiffs in error from raising the point in the *Supreme*

Court of the State if it was involved in the case as presented to that Court."

See also Mallett *v.* North Carolina, 181 U. S., 589, 592.

That is, the Federal right being "necessarily involved" in the claim made before the Appellate Court, and in the decision of that Court, that is sufficient to give this Court jurisdiction to review that decision.

If the mind of the State Court is directed to the fact that a right protected by the treaty is relied upon it is sufficient.

Eastern Building Assn. *vs.* Welling, 181 U. S., 47.

In the last cited case the mind of the Court was not so directed in the petition for rehearing, which is not our case.

In the last case referred to this Court held it was sufficient for the Federal question to be raised in the petition for rehearing provided the State Court considered such Federal question.

POINT V.

The Federal question was presented a second time to the Supreme Court in the petition for rehearing which was denied, and such decision necessarily involved a second consideration of the Federal question by the State Court.

The Insurance Company, within twenty days after the above-mentioned decision of the California Supreme Court, and on March 20th, 1901, filed in the said Cali-

fornia Court its petition for rehearing (Record, fol. 199). In that petition for rehearing, among other things it was distinctly claimed that an extra territorial effect should be given to the Hawaiian statute and that the decision of the Hawaiian Court was controlling, *by reason of the treaty.* This will be seen at Record, fol. 210, as follows:

"If, then, there was anything in the laws of Hawaii "which stated that the *lex domicilii* should not govern "in cases of this character, it must follow that the fic- "tion of plaintiff's rights in this policy following her "to California does not apply.

"We claim that there did exist such a provision in "the laws of Hawaii, as must appear at once from the "reading of the treaty rights then existing between the "United States and that country, where it was pro- "vided:

"'If the question should arise among several claim- "'ants as to which of them said goods belonged, the "'same should be decided finally by the laws and "'judges of the land wherein the said goods are.'

"This treaty is as much a part of the law of the "State of California as its own local law and constitu- "tion.

Hauenstein *v.* Lynham, 100 U. S., 483.

"Therefore the decision of the Hawaiian court in Carter "*v.* Mutual Life is controlling, because it is the decree of "a court where the 'goods were.'"

The Supreme Court of California denied the Insurance Company's petition for a rehearing on March 29, 1901 (fol. 223. Also at fol. 199).

That was a decision in which the Court again denied to the insurance Company, this plaintiff in error, its rights claimed under the treaty then called to the attention of the Court.

In the McGrew case the petition for rehearing raised fully the Federal questions and the Supreme Court of

California necessarily considered them in denying such petition, and the Supreme Court of California did not decline to pass upon them.

It has been held in the Mallett case (Mallett *v.* North Crolina, 181 U. S., 589), to be sufficient to retain a case upon the docket of this Court if the Federal question was raised for the first time by a petition for rehearing, provided the State Court in denying the petition for rehearing noticed the Federal question and passed upon it.

An inspection of the opinion of the State Court in the Mallett case shows that the discussion of the Federal question raised by the petition for rehearing was embraced in six lines of print and consisted of a terse statement of the point, a denial of its appositiveness and the citation of a single authority in support of the Court's view. The discussion would have been but little less brief had it been confined to the formula "petition denied."

On principle it would seem that the right to maintain the writ of error in the pending case would be the same. When the litigant has squarely presented the Federal question and its decision is fairly and necessarily involved in the issue, he has done all that can reasonably be required of him and the failure to provoke the State Judges into a discussion of its merits of greater or less length cannot have been intended by this Court as a logical standard by which to measure his right to maintain his writ of error here. Otherwise a hostile State Court could defeat this Court's jurisdiction by simply omitting express reference to the federal question. This Court has repeatedly said it would not tolerate any such attempt.

In the case at bar the judgments of the State Courts against the company could only have been reached as the result of the denial of the effect claimed for the Hawaiian judgments and statute under the treaty and Constitution. As it is the law of the land that Courts shall first hear and then upon consideration determine, it must be presumed

that the company's defense was carefully though erroneously weighed, and no discussion of it by the State Court, however elaborate, could have disposed of it more effectually than the words "motion denied."

This brief determination is not equivalent to "motion dismissed" without consideration but it involves judicial action on the merits of the matter presented.

Thus in Chapman *v.* Goodnow, 123 U. S., 548, this Court says:

"*We are aware that a right or immunity set up or claimed under the Constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a Federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused.*"

In Michigan Sugar Co. *v.* Michigan, 185 U. S., 113, the Court says:

"The Supreme Court of the State did not refer to the "Federal Constitution or consider and decide any Federal "question. For aught that appears, the Court proceeded "in its determination of the cause without any thought "that it was disposing of such a question.

"The rule is firmly established, and has been frequently "reiterated, that the jurisdiction of this Court to re-"examine the final judgment of a state court, under the "third division of section 709, cannot arise from mere "inference, but only from averments so distinct and posi-"tive *as to place it beyond question that the party bring-"ing the case here from such court intended to assert a "Federal right.*"

There can be no doubt in the cause at bar of such intention.

Rothschild *v.* Knight, 184 U. S., 339, 341.

Mr. Justice McKenna:

"A motion is made to dismiss the writ of error upon "the ground that no federal question was raised in the "Superior Court. Federal questions were raised, how- "ever, on writ of error to the Supreme Court, and that, "we think, was a sufficient claim."

See also

King *v.* Cross, 175 U. S., 396.
Chicago, Rock Island & Pacific *v.* Sturm, 174 U. S., 710.

It cannot be said that in this case the State Court declined to pass upon the Federal questions distinctly raised by plaintiff in error both before judgment and in the petition for rehearing without considering them, for it was necessary for the State Courts to have considered such questions if it considered the case at all.

The insurance company, the plaintiff in error, has already discharged the full measure of its obligation upon the policy in question, as the result of the decree of one Court of competent jurisdiction. It remains for this Court to say whether it shall again be required to pay the amounts called for by the policy because the California Courts, ignoring its pleas in bar and its Treaty and Constitutional rights and rejecting evidence offered in support thereof, has so decreed.

The federal question is thus clearly and distinctly presented by the record.

It would be preposterous therefore to claim that the Federal questions both under the Treaty and the Constitution, which exist in this record, are so clearly without color or foundation that this Court is without jurisdiction of this case, which is the test that has been repeatedly laid down by this Court.

POINT VI

Questions arose among several claimants, namely, Henri G. McGrew by his guardian, Charles L. Carter, Alphonsine McGrew, J. O. Carter, administrator of the estate of Henri G. McGrew, deceased, as to which of them said policy belonged, and the same were decided finally by the laws and judges of Hawaii, wherein the said policy was.

The decisions were that the policy belonged to Henri McGrew and his estate and the California court was bound under the treaty by the law as laid down by the Hawaiian judges and their decisions, and under the Constitution of the United States was bound to give full faith and credit to the divorce decree, the public act of Hawaii in regard to the effect of such decree, and the judgment in the administrator's action.

The contest in California was whether the administrator for the benefit of the infant son or the divorced mother was entitled to the proceeds of the policy. The California Court did not pretend that the company, as a matter of law, should pay twice. The California Court said, "The fact that appellant paid the policy to the wrong "party, would be no defense to an action brought by the "right party" (Rec., 97). The company claims here that, under the Treaty and Constitution, it had been finally decided by the Hawaiian law that the administrator was enti-

tled to collect the policy, and that the California Court was bound by said Hawaiian law. Any litigation involving the title to the policy comes within the operation of the treaty and must have been decided by the law of Hawaii where the goods were.

The policy had a *situs* of its own, but in any and every aspect of the case it was in Hawaii when the divorce suit was commenced, and continued there for the purposes of that action in view of the personal service on Alphonsine. She could not divest the jurisdiction of that Court over her personal property by leaving Hawaii, and the continued presence of the policy in Hawaii enabled the divorce decree to become effective by which, in virtue of the statute, the policy was vested in the husband.

When the divorce suit was commenced the goods, that is the policy, were in Hawaii, and both Henri and Alphonsine were domiciled in Hawaii, and the policy being a Hawaiian contract could have been enforced there against this Company.

Under every aspect of the case, therefore, the goods were *at that time* in Hawaii. They continued in Hawaii. The divorce suit was a proceeding *in rem* against the personal property of Mrs. McGrew as well as a proceeding in *personam*. The jurisdiction of the Hawaiian Court once attaching to the policy continued until final decree, and was not divested by Mrs. McGrew's removal to California, after service of process upon her in Hawaii. By the final decree in the divorce case, the policy remaining in Hawaii, its *situs* was there fixed by the adjudication that it was the property of Henri McGrew. That *situs* remained until his death, and the policy remaining there, it passed to the administrator Carter, and was "goods" in Hawaii where Carter sued the Company and recovered judgment.

This treaty is the Supreme law of the United States,

and is as much a part of the law of the State of California as its own local laws and constitution, and the judges in that State are bound thereby.

The decisions of the Courts of Hawaii and performance by this plaintiff in error as decreed by the judgments of those Courts protect it and give it "immunity" from further suit on the policy in any Court of any State of the United States.

The fundamental error made by the Supreme Court in California was, in deciding "that the Hawaiian Statute had no operation upon" the plaintiff Alphonsine or her "personal estate here" for the reason that "at the time when such statute could be invoked * * * she was domiciled in California," and that "the law which governs personal property is the law of the domicile" (see Record, fol. 194). The Court thus held that, the general rule that all personal property is in the place of the domicile of the owner, was applicable, and that the laws and decisions of the *Courts of California* should determine the claim of Alphonsine to this personal property, because that was Alphonsine's domicile, and consequently that was the place where the "goods are." The Court thus refused to give any force to the scope and effect of the treaty, and further, entirely ignored the constitutional provision that full faith and credit should be given to the two judgments in Hawaii.

The treaty was intended to protect all persons including corporations doing business in Hawaii. The plaintiff-in-error, therefore, can invoke its protection with respect to its business done in Hawaii and this policy issued there. It can therefore claim that the respective rights of the claimants to the policy and its proceeds shall be decided by the laws and the judges where the goods are. In making this claim, the plaintiff-in-error is standing upon its own rights under the treaty, and not setting up the right of another under the treaty. The question:

where the goods are, may, but does not necessarily depend upon the effect of the attempted change of domicil of respondent-in error during the pendency of the divorce suit. It is obvious either that her domicil continued in Hawaii where her husband resided, until the decree of divorce was pronounced, or that she could not change her domicil pending the suit so as to defeat her husband's inchoate rights obtained by their residence in Hawaii and his filing the bill of divorce, which rights were, to have the statute operate so as to vest in him, the personal property on her conviction of adultery, by the decree. If the decree of divorce and her change of domicil were simultaneous, the vesting of the policy in the husband was also simultaneous, because the statute was, by force of law, part of the bill for divorce, and of the decree with equal effect, as if it had therein been fully set forth and reviewed.

So soon as it appears that the goods, the policy in question, were in Hawaii, when respondent-in-error brought her suit in California, it also appears that the Company has the right to have the claimant's rights decided by Hawaii law. The Company, being obliged to pay the rightful claimant, is most deeply interested in being protected against paying the wrongful claimant, and has a right to invoke the treaty to establish this protection. The judgment in Hawaii was not conclusive against defendant-in-error as *res adjudicata*, but was evidence of the view the judges of Hawaii took of the effect of the statute upon the decree of divorce and the ownership of this policy, and as such was administered as proof of the law of Hawaii. The opinions, however, of the Supreme Court of Hawaii, which were admitted in evidence, sufficiently show that the law of Hawaii was that the policy in question was the property of the estate of the husband.

The judgment of Carter was, however, material and

relevant as showing payment by the Company of the policy in accordance with the rulings of the Hawaii Court with respect to the rights of the respective claimants.

I.

(1.) The General Object of the Treaty.

The general object of this particular clause of the treaty was to provide that the laws and judges of the land wherein the goods were, were to decide finally to whom they belonged in any controversy as to their ownership. The broad scope of the treaty was that if any question arose in the Courts of either country where the goods were between subjects or citizens of the respective countries, the decision of the Courts of that country, whichever it might be, should be final.

A clause similar to the one in the treaty between the United States and Hawaii has been quite usual in other treaties of the United States, and specimens of treaties containing similar clauses have been printed in an appendix to this brief, together with the corresponding foreign versions. The legal situation from a historical point of view was briefly as follows, and it is to be considered in its two aspects (1) the laws, or the *lex rei sitæ*, and (2) the judges, or the *forum rei sitæ*.

(*a.*) *The Lex rei sitae.*

After the barbarian invasions and the break-up of the Roman Empire, the system of personal law became prevalent. Under this system the rights of an individual were determined by his tribal law. He carried this law with him wherever he went. His domicile played no part whatever in determining what law should be applied when

litigation arose. The rule grew up that the defendant should defend himself in his own courts and by his own law. (Bar, International Private Law, 2d Ed., Sec. 14).

In the later middle ages the system of personal laws disappeared. As a general rule a man could be sued for debt in the place where he lived, and so the law of the debtor's domicile decided claims of debt (Bar, §15). This is an early application of the rule of *lex domicilii*. The *lex domicilii* came to prevail as to successions only after long conflict with *lex rei sitae*, and even after it was recognized as the general rule it was subject to many and important exceptions. *The present tendency is to enlarge the exceptions.* In several important countries of Europe, the *lex domicilii* has given way to the *lex ligeantiæ*, or national law (see Weiss, Droit International Privé, Tome 4, p. 508). The theories of the maxim, *Mobilia personam sequuntur*, have been various, viz.: (1) that goods formerly accompanied the owner, as he had power to bring them to his domicile; (2) that goods actually away from the owner's domicile are merely *branches* of his general mass of property which has its *root* at his domicile (Weiss, Dr. Int. Priv., t. 4, p. 163); (3) that a person acquires a power of *attraction* over things (Holzschuber, referred to by Bar, §222); (4) a mere extension of one's personality (Holland, on Jurisprudence 9th, ed., 178).

In matters of succession England and the United States apply generally the *lex domicilii*, while Germany and Italy apply the national law (or *lex ligeantiæ*).

See Bar, Priv. Int. Law, Sec. 365.

One of the clearest statements of the divergent laws applicable is the following by Despagnet:

"Les législations étrangères se partagent en quatre "catégories: 1° Celles qui appliquent à la succession "immobilière la loi de la situation, et à la succession

" mobilière celle du dernier domicile du défunt, comme " en France, ou, parfois, la loi nationale : Belgique, " Autriche, Roumanie, Hollande, Monaco, Angleterre, " Suède, Pérou, Mexique ; 2° Application à tous les biens " de la succession, meubles et immeubles, *de la loi de la* " *situation :* Russie ; 3° Application à tous les biens, " mobiliers et immobiliers, de la loi du dernier domicile " du de cujus : République Argentine, Chili ; 4° Applica- " tion de la loi nationale du défunt à tous ses biens : " Allemagne loi d'introduction au nouveau Code Civil, " Art 24 et 25, remplacant l'ancienne loi du domicile ; " Italie, Espagne, Serbie, canton de Zurich."

[Despagnet Droit International Privé 3rd Ed., p. 683].

This question of the proper law applicable was so important and the necessity for a uniform rule on the subject so great, that it was one of the subjects of the second conference at The Hague in 1894 on the subject of private international law and in the Final Protocol the delegates agreed to submit to their respective governments the principle that the law which should prevail should be "loi national du defunt" (See the original report of the conference of 1894).

In view of the above and other divergent rules and theories, there was a clear reason for the regulation of the matter by treaty, and it has been regulated by treaty in many cases.

In these treaties the words "personal property," whether tangible, or intangible, are identical with the words "goods," and in all these treaties the supreme law of the United States is that any question that may arise as to the rightful ownership of personal property, shall be finally determined by the Judicial Tribunals of the country in which they are *actually* situated ; that is, the ***lex rei sitae*** shall govern, ***and not the lex domicilii.***

The theory adopted by the Treaty is sanctioned by the highest authority (Rattigan, p. 81).

"And the third theory is to apply the *lex loci rei sitæ* "to moveables as well as immoveables. This is the theory "advanced by Grotius, and Fiore, and Asser-Rivier, and, "with certain modifications, is practically adopted by Bar "as supplying the only true law that can be applied, and "and resting upon the intolerable inconvenience of any "other doctrine."

(*b.*) *The "judges" or forum rei sitae.*

Holland says that given a set of circumstances the legal consequences of which are disputed, it obviously becomes necessary to ascertain in the courts of what country the dispute can be decided, in other words, what court has jurisdiction to try the case *ratione territorii.*

He then says that the possible forum may be "that of the country in which the plaintiff, or the defendant, is domiciled, or to which he owes allegiance (*forum ligeantiae*, or *domicilii*, *actoris*) or in which the defendant happens to be (*forum ligeantiae. domicilli*, or *praesentiae, rei*) ; *that of the country in which the object in dispute is* (*forum rei sitae*) ; that of the country in which the juristic act in question, which may have been for instance a marriage, or a sale, or the making of a will, took place (*forum, actus, contractus*) ; that of the country in which the wrongful act in question took place (*forum delicti commissi*) ; that of the country in which a contract was to produce its results ; or that in which the plaintiff chooses to commence proceedings (*forum litis motae* or *fortuitum*) (Jurisprudence 9th Ed. 387).

Now it was the object of the treaty to declare what shall be the forum and it was agreed that if a question arose among several claimants as to which of them goods belonged, the judges of Hawaii should have exclusive jur-

isdiction ("decided finally"), provided the goods were in Hawaii, and that is what is claimed in this case.

(2.) THE LAWS AND JUDGES OF HAWAII HAD UNDER THE TREATY POWER TO DECIDE FINALLY TO WHOM THE POLICY BELONGED, BECAUSE THAT WAS THE LAND WHEREIN THE GOODS WERE.

(*a.*) *The policy was covered by the word "goods" in the treaty.*

It is claimed by the defendant in error that the term "goods" as used in the treaty does not cover a chose in action, but refers only to tangible personal property.

As a matter of fact, the "goods" were in Hawaii when the action for divorce and the action against the Mutual Life there were begun.

The word "goods" in the treaty is a word frequently employed in treaties and corresponds to the word "biens." This word "biens" includes *all* personal property.

This French word "biens" is used to include a policy. Thus in the report of a case in the Journal du Droit International Privé, Vol. 22, 1895, p. 369, the report says: "La police, comme d'autres polices concues dans les mêmes termes, fut mentionée dans l'inventaire *à titre de bien hereditaire*" etc. (was mentioned in the inventory under the title of inheritable goods).

The particular words in the treaty are used as synonymous with personal estate, as a reference to preceding paragraphs will show, *e. g.*: "They shall be entitled to dis-
"pose of their *personal property of every kind and descrip-*
"*tion*, by sale, gift, exchange, will, or in any other way
"whatever, without the smallest hindrance or obstacle; and
"their heirs or representatives being subjects or citizens
"of the other contracting party shall succeed to their
"personal goods, whether by testament, or *ab intestato*,

"and may take possession thereof, either by themselves or "by others acting for them and dispose of the same at "will, paying to the profit of the respective governments "such dues only as the inhabitants of the country wherein "the said goods are shall be subject to pay in like cases."

The term "personal goods," which the treaty deals with, must *include* all of one's personal estate, because it could not be intended to *exclude* the right of disposing of or succeeding to such property as policies, stocks, bonds, choses in action, etc. For this would exclude by far the greater portion of the property of the individual, and it is a general rule in the construction of treaties that a *liberal and not a restrictive construction of the rights to be claimed under it should be followed.*

Shanks *v.* Dupont, 3 Pet., 242.
Hauenstein *v.* Lynham, 100 U. S., 483, 487 and cases cited.

Mr. Justice BROWN has, in the very recent case of Tucker *v.* Alexandroff, 183 U. S., 437, expressed this rule fully and forcibly:

"We think, then, that the rights of the parties must be "determined by the treaty, but that this particular con- "vention being operative upon both powers and intended "for their mutual protection, should be inter- "preted in a spirit of *uberrima fides*, and in "a manner to carry out its manifest purpose. Taylor on "International Law, Sec. 383. As treaties are solemn en- "gagements entered into between independent nations for "the common advancement of their interests and the inter- "ests of civilization, and as their main object is not only to "avoid war and secure a lasting and perpetual peace, but "to promote a friendly feeling between the people of the "two countries, they should be interpreted in that broad "and liberal spirit which is calculated to make for the ex- "istence of a perpetual amity, so far as it can be done "without the sacrifice of individual rights or those prin- "ciples of personal liberty which lie at the foundation of

" our jurisprudence. It is said by Chancellor Kent in his " Commentaries (Vol. 1, p. 174): 'Treaties of every kind " 'are to receive a fair and liberal interpretation according " 'to the intention of the contracting parties, and are to be " 'kept with the most scrupulous good faith. Their mean- " 'ing is to be ascertained by the same rules of construction " 'and course of reasoning which we apply to the interpre- " 'tation of private contracts.' "

If the word "goods" in the treaty was limited only to purely tangible or strictly corporeal personal property then it necessarily follows that the treaty, where it provides that disposition can be made of personal property by sale, gift, exchange will, or in any other way, and succession shall be to *personal goods*, whether by testament or *ab intestato*, and possession may be taken "thereof by themselves or others acting for them, and dispose of the same at will," refers only to strictly corporeal property like a watch or piano, and not to policies, bonds, stocks, etc., and that the treaty gives no protection to subjects or citizens of either country claiming title or succession to bonds, policies of insurance, stocks, etc., and gives them no right of disposition of the same.

The particular paragraph in question then proceeds: "And if a question should arise among several claimants as to which of them *said goods* belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are."

Thus the word "said" being referred to, its proper antecedent shows that it was the intention of the contracting parties to include by the term "goods" all the personal estate of the individual. That this view is correct is clearly shown by the clause in the Treaty "paying to the profit of the respective Goverments such dues only as the inhabitants of the country *wherein the said goods* are shall be required to pay in like cases." Under this there can be no doubt that dues if payable would be pay-

able on a policy actually within one of the jurisdictions. The Inheritance Tax Law of Hawaii refers to "property" "within this Republic." Session Laws Hawaii, 1892, Ch. CVI, Section 1. See also Civil Laws 1897, S. 910.

This view is sustained by the fact that the treaty then proceeds to pass upon rights in real property, it being the evident purpose to provide for rights in all property, personal and real.

The term "goods" is by no means limited to strictly tangible moveables such as ordinary chattels, but in many cases it has been held to include such choses in action as policies, bonds, etc.

Thus, the word "goods" in the Statute of Frauds has frequently been held to include these.

See Dowdel *vs.* Hamm, 2 Watts, 61, 65, where the Court said:

> "The words 'goods' is '*nomen generalissimum*', and "when construed in the abstract the term will embrace all "the personal estate of the testator, bonds, notes, money, "plate, furniture, etc."

Tisdale *vs.* Harris, 20 Pickering, 9;
Greenwood *vs.* Law, 25 At. Rep., 134;
Terhune *vs.* Bray's Ex., 16N. J. Law, 53.

No good reason can be suggested for holding that this treaty intended to affect questions relating to the title to strictly tangible personal estate, but to no other personal property, and, therefore, the word "goods", taken in its general sense, must include this insurance policy.

No *reason* has been shown why in this 8th clause of the treaty there should be a distinction made between strictly tangible personal property and chattels such as policies, bonds, etc., nor does counsel cite any *authority* for such a distinction. It is merely based on a claim that a "*restrictive*" and not a "*liberal*" construction should

be placed on the treaty, which claim is contrary to the rule of construction adopted by this Court.

The counsel for the defendant in error in claiming that this insurance policy theoretically moved with Alphonsine when she went to California claims that the word "goods" refers only to strictly tangible property, and he cites the case of Kirtland *vs.* Hotchkiss, 100 U. S., 491, 493, which decides only that a

"debt, although a species of intangible property, may, for the *purpose of taxation*, * * * be regarded as situated at the domicile of the creditor," and that a "bond, wherever actually held or deposited, is only evidence of the debt."

This is true only on a question of the location of property of this class for the purpose of taxation under statutes that distinctly and by terms subject such property to taxation at the domicil of the owner. In New York bonds were uniformly held taxable where they were located, until a statute was passed subjecting them to taxation at the domicil of the owner.

(*b.*) *The phrase "wherein the goods are" cannot possibly refer to the domicile of the owner, but refers to the actual situs of the property and its physical location.*

"Goods" such as policies can have a location, and the test of "wherein the goods are" cannot possibly be the owner's domicile, for "ownership" is the very issue referred to in the treaty. If this were not the case the treaty would ineffectively read that if a question arises as to whom the goods belong, it shall be finally decided by the courts of the domicile of the claimant to whom they belong, which is a *reductio ad absurdum*.

This is pointed out by Rattigan in his work on Private International Law, Ch. IV., page 81, where he says :

"But this theory is open to the double objection that "it is, in the first place, altogether illogical to attempt "to determine disputed rights in moveables by the law "of the domicil of one of the parties concerned, for the "title can only be settled by the decision itself, and to in-"voke the law of the owner's domicil in order to arrive at "that decision is to proceed in 'a vicious' style, which "obviously leads to no practical result; and, in the next "place, as the owner's domicil may often be widely re-"moved from the place where the moveable in dispute is "in fact, it would seem to be unreasonable, in such a case "at all events, to decide who is the owner of the thing "with reference to a law which cannot give the possession "of that thing."

The *situs* of the goods was in Hawaii, either because their actual location was there, or because they were enforceable there against the debtor, The Mutual Life.

It is necessary, of course, to determine what law is referred to. In order to do this, it is necessary to determine "where the goods are" within the meaning of the treaty. We will show that the words can refer, either, firstly, to the law of the place where the goods actually are, or, secondly, to the law of the place where the policy could be enforced.

The words "land wherein the goods are" can refer to Hawaii, where the policy actually was.

No objection could be taken to this position so far as strictly tangible property is concerned, nor in the case of this policy, which is the only property before the Court, can it be claimed that a different interpretation applies.

A policy of insurance *may be* separated as to its *situs* from the domicile of its owner by the treaty.

It is perfectly well settled that a policy of life insurance is assets where found, for purposes of administration, and the actual situs of the policy itself is material in determin-

ing whether Courts have jurisdiction and exclusive jurisdiction in an action by an administrator.

In the very recent case of Equitable Life *vs.* Brown, decided by this Court Dec. 1, 1902, it was held that a life insurance policy in Hawaii had a situs there, and that the Hawaiian administrator was entitled to collect the policy, following the case of N. E. Life *vs.* Woodworth, 111 U. S., 138.

See Sulz *vs.* M. R. F. L. Assn., 145 N. Y., 563, cited in the Brown case.

Wyman *vs.* Halstead, 109 U. S., 654.

The learned opinion of Mr. Justice McKenna in Chicago, etc., R. R. *vs.* Sturm, 174 U. S., 710, is against the use of the artificial considerations, fictions and refinements of the doctrine of situs to work injustice such as is attempted here.

For some purposes the domicile of the owner is deemed the *situs* of his personal property.

This is a legal fiction, not of universal application, and may be changed at will by constitutions, treaties and statutes.

The only question is, was it the intention of the treaty to make the *lex rei sitæ* apply? We show below that it could not have been the intention of the treaty to refer to the land of the owner's domicile; hence it must have reference to the actual *situs* of the policy in Hawaii which was the place where the policy was and where it could be enforced.

In the appendix the version of this clause in the foreign languages is expressly quoted to show that such language is in harmony with this notion of an actual *situs*.

Holland in his Jurisprudence (Ninth Ed.), at p. 391, says:

"The possible law may be that of the country to which

"one of the persons concerned owed allegiance (*lex ligeantiæ*), or in which he is domiciled (*lex domicilii*), *or in which the thing in question is situated* (*lex loci rei sitæ*), "or in which the wrong in question was committed (*lex loci delicti commissi*, or in which an act, such as the making of a will or of a contract, was performed (*lex loci actus*), of which contractus is a species, or in which a "contract was to be carried out (*lex loci solutionis*)."

It is perfectly evident that the treaty selected not the *lex domicilii*, but the *lex loci rei sitæ*.

It is only necessary to show, therefore, that goods, such as insurance policies, bonds, notes, etc., *can* in law have a location independent of the domicile of the owner. This is elementary. The *lex rei sitæ* may apply to such property as well as to strictly tangible property, as to which text writers make no distinction. Wharton refers to public loans, railway bonds and other securities in Sections 305, 306 and 307 as coming under the rule (Conflict of Laws). He says as follows:

"As to such movables, *situs* is as necessarily the arbiter "as is the case with immovables" (Sec. 307).

(c.) *It is impossible for the meaning of the treaty to be that if a question arises as to which claimant goods belong, which is to be decided finally by the laws and Judges of the land wherein the said goods are, that said goods shall be deemed to be in the land which is the owner's domicile.*

This contention and the decision of the Court in accordance with this view completely nullifies the treaty. There would be no necessity of the provisions in the treaty "that the laws and Judges of the land wherein the said goods are" should be decisive of any question arising among claimants to the goods, unless the words "land wherein the said goods are" mean where they *actually* are and not where they are according to some legal fiction. The cases

cited in the opposing counsel's brief as to the rule that "intangible personal property has no *situs* apart from the domicile of the owner" are cases *where no treaty or other "supreme law" constitutional or legislative has provided otherwise*. In the case at bar, the treaty provides, in effect, that change of domicile, *by itself*, shall not affect the situs of personal property. That is, that in order to change its *situs* it must be actually taken from one country and actually located in the other. Although personal property by "fiction of law" is sometimes for some purpose deemed to follow the owner, yet this treaty in effect says that when a dispute arises as to the ownership of personal property the same shall be decided by the law of the land wherein the personal property *actually is situated irrespective of the residence or domicil of the claimants*.

The treaty referred to controversies between subjects or citizens of the respective states, and it was not the domicile of either that was in mind, but the location of the goods. The subject of the United States might be governed by the laws of Hawaii or the United States, according to where the goods actually were, and so with the subject of Hawaii.

That is, *by virtue of this Hawaiian treaty*, the law which governs this policy and the claims and rights thereunder, *is not*, as the California Court held, "the law of the domicile" (Record fol. 194), but as the plaintiff in error claims, the law "*rei sitæ*."

If it were not for the treaty, then in any controversy as to personal property, actually located in either country, to which a citizen or subject of either country might be a party, a "vexed question" would arise as to whether the *lex domicilli* or the *lex rei sitæ* should control. As a question of international law, irrespective of treaty, this is a "vexed question."

This Court in Green *vs.* Van Buskirk, 7 Wallace, 139, 150, in speaking of

"The fiction of law that the domicile of the owner draws to it the personal estate which he owns wherever it may happen to be located" says: 'this fiction is by no means of universal application,' and as Judge Story says, 'Yield, whenever it is necessary for the purpose of justice that the actual situs of the thing should be examined.'

And again, (at pages 150 and 151):

"We do not propose to discuss the question how far the transfer of personal property lawful in the owner's domicile will be respected in the courts of the country where the property is located and a different rule of transfer prevails. It is a *vexed question*, on which learned courts have differed; but after all, there is no absolute right to have such transfer respected, and it is only on a principle of comity that it is ever allowed. *And this principle of comity always yields when the laws and policy of the State where the property is located has prescribed a different rule of transfer than that of the State where the owner lives.*'"

The United States had *power* by the treaty to declare that the law of the domicile should not govern, and it is merely a question *of what was the intention.*

This is fully recognized by this Court.

In the following case (Eidman *v.* Martinez, 184 U. S., 578, 581), Mr. Justice Brown delivering the opinion of this Court refers interestingly to the evolution of the doctrine, and learnedly says:

"The ancient maxim of the law, *mobilia sequuntur* "*personam*, was the outgrowth of conditions which have "largely ceased to exist, and of an age when personal "property consisted principally of articles appertaining, "as the name indicates, to the person of the owner, such "as gold and silver, jewels, apparel, and less immediately

" to horses, cattle and other animals, and to the products " of the farm and the shop. As this property was, in " primitive times, usually kept under the personal super- " vision of the owner, and was often carried about by him " on his journeys, (as it often still is in Oriental countries), " the principle became incorporated in the law that its " locality was determined by the domicile of the owner, " and that his rights with respect to such property were " fixed by the law of that domicile.

" While the enormous increase in the amount and " variety of personal property during the past century " has necessitated certain limitations of the maxim, " particularly in matters of taxation, it is by no means " obsolete. It is still the law that personal property is " sold, transmitted, bequeathed by will, and is descendible " by inheritance according to the law of the domicile and " not by that of its situs."

Cross *vs.* United States Trust Co., 131 N. Y., 330;

Ennis *vs.* Smith, 14 How., 400, 424;

Dammert *vs.* Osborn, 141 N. Y., 564.

* * * * * * serious encroachments have been made upon the ancient maxim. * * *

Green *vs.* Van Buskirk, 5 Wall, 307; S. C., 7 Wall., 139;

Hervey *vs.* Rhode Island Locomotive Works, 93 U. S., 664;

Walworth *vs.* Harris, 129 U. S., 355;

Security Trust Company *vs.* Dodd, 173 U. S., 624, and cases there cited.

"The same principle has been applied not only to tan- " gible property but to credits and effects."

Tappan *vs.* Merchants' National Bank, 19 Wall., 490;

Savings Society *vs.* Multnomah Co., 169 U. S., 421.

New Orleans *vs.* Stempel, 175 U. S., 309.

Bristol *vs.* Washington Co., 177 U. S., 133.

"The question in each case is not of *the power* of the "legislature to tax the personal property of non-residents, "both tangible and intangible, since that is well estab- "lished both in England and America, *but of its intent* to "do so by the particular act in question."

Mager *vs.* Grima, 8 How., 490.
Eidman *vs.* Martinez, 184 U. S., 581.

And in case of New Orleans *vs.* Stempel, 175 U. S., 319, 322, Mr. Justice BREWER sums up broadly the doctrine, saying:

"With reference to the decisions of this court it may "be said that there has never been any denial of the "*power* of a State to tax securities situated as these are, "while there have been frequent recognitions of *its power* "*to separate* for purposes of taxation the situs of per- "sonal property from the domicile of the owner. * * *

"It is well settled that bank bills and municipal bonds "are in such a concrete tangible form that they "are subject to taxation where found, irrespective of the "domicile of the owner; are subject to levy and sale on "execution, and to seizure and delivery under replevin; "and yet they are but promises to pay—evidences of "existing indebtedness. Notes and mortgages are of the "same nature; and while they may not have become so "generally recognized as tangible personal property, yet "they have such a concrete form that we see no reason "why a State may not declare that if found within its "limits they shall be subject to taxation."

Story (Conflict of Laws, Section 379), speaks of it as a "fiction of law," and says, "a sense of general utility must have first suggested the doctrine."

In Sections 383 and 384 he mentions a number of exceptions to this "general rule," and in Section 385, refers to cases where disputes often arise when the laws of the domicile clash with the laws of the place where the property is situated, in which cases the *lex sitæ* governs.

See Minor Conflict of Laws, § 121, *et seq.*

In Wharton's Conflict of Laws, Section 311, the "rule of international law" is thus stated :

"Movables, when not massed for the purposes of succession or marriage transfer, and when not in transit, or following the owner's person, are governed by the *lex situs ;* though in some jurisdictions an exception may be made in cases where all the parties being subject to a common domicile, are held to be bound by the laws of that domicile."

The reason being (299):

"That if it is the domicile of the owner which is to decide, it *becomes a difficult and sometimes insoluble question to determine who this owner is.* An action is brought to decide as to the ownership of a chattel. The litigants have different domiciles; and if the article in dispute is to be subjected to the owners domicile, *the question as to who is the owner not being yet decided the suit* has to be stopped at the outset from *inability to determine as to how it shall be tried.* Then, again, if possession be the test, there may be several possessors, or persons claiming to be such, each with a different domicile, from which confusion almost equally obstructive would ensue."

Again at Section 308, he states as follows :

"To movables as well as to immovables applies the position that if the *lex rei sitæ* be not accepted, there is no available decisive law,"

and refers to

" the failure of justice which would flow from application
" of the *lex domicilii* to issues framed to determine which
" of several claimants 'having different domiciles is en-
" titled to a particular article,' and says: 'If the *lex dom-*
" *icilii* is the exclusive judge, there could be no decision
" on any point in which the laws (of the two domiciles)'
" differ, for we would have then a *collision between two in-*
" *dependent systems of law* each supreme with no arbiter
" to decide which is to prevail. Because, therefore, the
" *lex domicilii* (1) involves a *petitio principii*, and (2) is

"from its very nature incapable of deciding an issue be-
"tween two or more claimants of distinct domiciles, we
"must reject it as insufficient for the purposes for which
"it is here invoked. * * * The only alternative, then,
"is the *lex rei sitæ;* and this has the advantage of being
"the law to which the thing litigated is, by the very
"fact of its being deposited on the soil, at least tacitly
"committed by the parties."

The treaty has removed the danger of any collision between independent systems of law.

Both parties to this treaty clearly saw the necessity of avoiding "this vexed question" and of settling upon some uniform rule for the determination of claims to personal property, and they decided that the *lex rei sitæ* should govern *without any regard to the domicile of the claimants.* They clearly saw that any reasons that might exist for the "fiction of law" that personal property followed the domicile of the owner could not properly apply to any claim to the same that might arise between claimants having different domiciles. The treaty, in effect, provides that the ownership of personal property shall not be regarded as following the owner. The domicile of any claimant is absolutely immaterial in determining any claim to such ownership. That is, if personal property be located in Hawaii it shall be regarded as remaining there unless the same is physically and actually taken away and located in another country.

The two nations had agreed on this clause VIII of this treaty in order to avoid a controversy such as has here arisen and in order to make it certain the laws and forum of one country should control.

If this were not the case the treaty would read that if a question arises as to whom the goods belong, it shall be finally decided by the courts of the claimant to whom they belong.

(*d.*) *The goods, that is the policy, were in Hawaii*

and that is the land referred to, because in addition Hawaii was the place where the policy could be enforced.

It is well recognized that the situs of a chose in action may be the place where it can be enforced, and as at all times this policy could have been enforced in the Kingdom of Hawaii, and as a matter of fact, was enforced there, the Treaty could be readily interpreted, so far as this policy is concerned, as referring to the Kingdom of Hawaii. Dicey, on "The Conflict of Laws," says:

"Whilst lands and generally, though not invariably, goods must be held situate at the place where they at a given moment actually lie, debts, choses in action, and claims of any kind must be held situate where the debtor, or other person against whom a claim exists, resides; or, in other words, debts or choses in action are generally to be looked upon as situate in the country where they are properly recoverable or can be enforced" (3d ed., p. 159).

"It is clear that choses in action can be collected by suit only in the jurisdiction where the debtor or his property can be reached. This ordinarily has been and will be the place where the debtor resides. It may, however, be any place where legal service of process can be made upon the debtor, or a legal attachment can be made of his property.

As one writer puts it, a chose in action must be considered as situate at the place where it can be effectively dealt with. It is useless to say that a chose in action follows the person of the creditor when the matter in hand is the enforcement of payment of a law suit.

The rules adopted at an early day by the English courts were evidently all based upon the principle that choses in action are to be considered as located in the place where they can be effectively dealt with, *i. e.*, reduced to case. Simple contract debts were held to follow the person of the debtor, and to be *bona notabilia* in the locality where the debtor lived at the decease of the intestate. As administration usually followed close upon the decease of the intestate, and debtors generally were permanent residents, administrators appointed at the places where the debtors resided at the time of the decease of the intestate

apparently found no difficulty in bringing suits in the jurisdiction where they were appointed" (11 Harvard Law Review, p. 101).

(3.) THE ADMINISTRATOR'S ACTION WAS WITHIN THE TREATY AND THE GOODS WERE IN HAWAII.

On the death of Henri McGrew, Carter, administrator, a subject or citizen of Hawaii, and The Mutual Life Insurance Company, a subject or citizen of the United States were parties to a controversy as to whom the policy belonged, it having already been decided in the divorce case.

The divorce was granted in Honolulu August 24, 1894. The policy was then in Honolulu, and by virtue of the decree of divorce it belonged to Henri McGrew, who was domiciled there and a subject and citizen of Honolulu. The contingent interest of Mrs. McGrew had been absolutely cut off by the divorce decree, as much as if she had then died.

Her situation was similar to that of the wife in Brown's Appeal, 125 Pa., St. 3 9, where the children had the interest after her death, the Court saying: "She was the "payee named in the first instance, but the promise to her "was not an absolute and unconditional promise to pay to "her, or to her administrators, executors or assigns, but a "promise to pay her upon condition that she was living "when the policy should fall due. * * * They (the "children) were parties to the contract, as truly as she "was, and have as clear a right to sue upon it, upon the "happening of the contingency that made them the "payees, as she could have had if living."

When Alphonsine moved to California the possession of the policy was still in Henri, and the Hawaiian Court did not lose jurisdiction of her person and her personal

property in the divorce suit. The California Court did not perceive the precise character of her extinguished interest, but simply declared that the law of *her* domicile, which they claimed to be California, controlled, not perceiving that Henri himself had possession and an interest, which was controlled by the law of *his* domicile in the divorce suit and also by the law of Hawaii as the place where the goods were under the Treaty.

A suit was begun by his administrator, Carter, in Hawaii against The Mutual Life Insurance Company of New York, a subject or citizen of the United States, in which suit the question arose between the claimant Carter and the claimant Company (claiming it is true for Alphonsine McGrew, then according to counsel's contention, a subject or citizen of the United States) as to which of them the policy in Hawaii belonged. The Company contested the claim of Henri McGrew (Rec., fol. 15) on behalf of Alphonsine McGrew and claimed the right to retain the monies due as against Henri's administrator. The Mutual Life is a subject or citizen of the United States within the meaning of the Treaty (Janson *vs.* Driefontein Mines, Lim, L. R. App. Cas, 1902, p. 501).

Alphonsine left Honolulu April 5, 1894, taking Henri's only son with her, and when Henri died in October, 1894, his heir and next of kin were absent since the divorce decree having been rendered in August, 1894, Alphonsine was no longer heir or next of kin of her husband (See Hawaiian Statute in Appendix).

The words in the treaty are "heir and representative." These words undoubtedly refer to those persons entitled to succeed to the realty and personalty. The word "representative" does not always mean executor or administrator, but also means next of kin, Sulz *v.* Mutual R. L. F. Assoc. (145 N. Y., 573), and as the word "heir" is used in relation to realty, the word "representative" in this connection undoubtedly means next of kin. As

a matter of fact, the sole next of kin, namely, Henri's son, at the time of his death, was absent in California. Whether this has any direct bearing or not upon the questions now before the Court, this fact exists in the case.

The youthful McGrew was residing in San Francisco with his mother, where she was then under the purview of the Treaty at least a subject or citizen of the United States, and the youthful McGrew was also a subject or citizen of the United States.

Henri McGrew was a citizen or subject of Hawaii, and died in Hawaii leaving goods there. His heir and next of kin, the youthful McGrew, was a subject or citizen of the United States within the Treaty, and had a right under the Treaty to succeed to the goods in Hawaii.

The statutes of Hawaii are in evidence that the child would get the benefit of the policy if there were no debts, and Henri cannot be presumed to have had debts. The fact in the record that the Company *paid* the administrator, and that legally the child was entitled to the benefit is a sufficient justification of the extracts we have given in the appendix from the records of the estate of Henri (See Appendix).

Exception No. 1 was " the Court erred in sustaining the objection of the plaintiff to the introduction in evidence of the payment by the said Insurance Company to J. O. Carter, as the administrator of the estate of said Henri Golden McGrew, deceased, of the full amount of money due upon said policy " (Record p. 36).

It was the view of those who negotiated this Treaty, that the ordinary rule that the administration and distribution of an intestate's estate are governed by the laws of the domicile of the deceased should be changed, and the object of the Treaty was to change this rule and provide generally not only that all questions relating to the administration or distribution of goods, should be governed by the laws of the place where goods were, but *that all*

controversies affecting citizens or subjects of the different states should be. These goods might or might not be at the domicile of the deceased.

In our case, McGrew was an Hawaiian subject or citizen and he died in Hawaii, leaving his heir and next of kin absent in the United States, and with a claim against an American citizen based on goods situated in Hawaii. Assuming Mrs. McGrew could change her domicile and become a citizen of the United States, the Mutual Life was making a claim on her behalf, and it was also making the claim as an American citizen, that it had nothing in its possession constituting assets of the deceased. Here was a question raised by the administrator as to whether the proceeds constituted a part of the deceased's estate, and the suit was against a subject or citizen of the United States, and then the question is, whether the Hawaiian court, having in that suit decided that by the laws of Hawaii the policy was a part of the estate of Henri McGrew, all the courts of the United States would not be bound by it. The administrator had a right to sue the foreign debtor; he did sue it; the goods were there; the decision was that the estate was entitled to it, and the California Court is bound by the law as laid down by the judges in Hawaii, that is, the California courts are bound under the Treaty to apply the law as laid down. The question decided in the administrator's case in Hawaii was a question connected with the estate of an Hawaiian, and as the funds were in Hawaii, the case is brought within the Treaty.

The opinions of the Hawaiian Court annexed hereto show that the Company presented fully its claim that the policy did not belong to the claimant administrator.

The Company was sued, it could not prevent itself being sued. But it stood in the California Courts having the Treaty rights secured to it, namely, that the decision of the Hawaiian Court should be final.

The question was whether the administrator owned the

policy, and the Company, as a citizen or subject of the United States, was bound by the terms of the Treaty and entitled to the benefits of it.

It was not necessary for Mrs. McGrew to be a party to the administrator's suit, for the Treaty declares that the claims in the Carter admr. case should be decided by the laws and judges of Hawaii, and they were so decided, and under the Treaty the Company cannot be vexed twice.

For the purpose of the operation of the Treaty, it was entirely immaterial whether Alphonsine was a party to the Carter suit or not. This is really conceded by counsel for Alphonsine in their brief in this Court on the motion to dismiss the writ of error, where they claim on page 14, as follows:

"If there has been any determination of the ownership of this policy between several claimants, then, by the California judgment, the ownership of this policy has been 'finally decided by the laws and judges of the land wherein the said goods are.'"

The defendant in error claims that no question has arisen in Hawaii among several claimants as to which of them said goods belonged.

But this is practically conceded by the defendant in error, because on the motion to dismiss they claim that if there has been any determination of a controversy as to the ownership of this policy between several claimants, then it has been done by the California judgment in a suit to which Carter Administrator was not a party. The California case was between Alphonsine McGrew and The Mutual Life. If the moving party concedes therefore that a question between claimants arose in the California case, they must necessarily concede that it arose in the Hawaiian suit brought by the Administrator of McGrew against the Company.

Alphonsine was decided by the Hawaiian Court not to be necessary party to the administrator's action.

The defendant in error relies on the California judgment as one in accordance with the treaty. To that action only Alphonsine and The Company were parties. This necessarily involves a concession of the point we have claimed, viz.: that for the operation of the treaty it was not necessary that Alphonsine should be a party to the Carter suit.

This case in California is brought against a citizen of the United States who was a party to the Carter case. Alphonsine comes as a suitor into the Courts of California, which are bound by the treaty. She might be able to attack the Carter judgment for fraud or collusion. But the California Court as a Court was bound by the law as laid down in the final decisions of the Court and Judges of Hawaii. They erred in not so deciding.

The pith of the whole matter is, that a question arose between an Hawaiian and this Company, an American subject or citizen, as to whether this policy was assets of the deceased, or not, and the treaty declared that in such case the law of Hawaii and the forum of Hawaii should control. The Hawaiian Court held Mrs. McGrew not a necessary party, and decided against us that the policy belonged to the estate. Had Mrs. McGrew sued us in Hawaii after this she could not have recovered. The Company is then entitled to protection by the treaty.

She was not a party to the record in the Carter case, but she was personally served in the divorce case and that case involved the title to the policy. She must be presumed to have had knowledge of the Hawaiian law, and that if defeated the divorce case would result in the policy going to her husband. She knew the policy was in Hawaii. Before she removed to California she knew the title to it was a subject of dispute.

On the trial she was asked, "Did you bring this policy

of insurance with you when you came up from Honolulu?"
"A. I did not have it; Mr. Carter had it. He took it out of my husband's safe, while we were in Honolulu. I objected and told him he had no right to take anything that was in the house; *that they belonged to my husband.* He said, at the time, that he was the doctor's guardian" (Record, p. 30).

It is to be observed that Mrs. McGrew here recognized the possession of the policy as rightfully in her husband, and only objected to the guardian taking it on that ground. At the time the divorce suit was pending she knew that in case it was decided against her, the husband would own the policy. She voluntarily went to California, and abandoned the policy so far as any contest over it in Hawaii was concerned.

She left in April, 1894, and the next premium became due in September, 1894, more than a month before October 22, when McGrew died, and the premium must be presumed to have been paid by Carter for the benefit of McGrew.

In Grant *vs.* Conn. Mutual Life, 29 Wisconsin, 125, 131, there was a suit by an assignee of a life policy. The Company defended on the ground that the administrator was entitled to it. The administrator was a non-resident. The assignee applied to have the administrator made a party. It was denied, and this was assigned as error, but the Court said,

"The facts which the plaintiff must prove in order to
"recover, would constitute a complete defense to an action
"brought by the administrator on the policy. For, if
"the insurance money belonged to the plaintiff, then
"the administrator had nothing to do with it. And
"whether it did in fact belong to her, was the issue
"raised by the pleadings. Besides, we do not very
"well see how the court could bring in the
"administrator, he being a non resident. We do not think

"that he could be brought in under any of the sub-divis-
"ions of Section 10, Chap. 124, R. S. And it seems to us
"that the cases provided for by the law of 1864, where the
"Court is authorized to 'prescribe the manner in which'
"the copy of the order and notice of the suit 'shall be
"served, and also the time within which such person or
"persons so served shall appear and file an answer,' relate
"to cases where the parties are within the jurisdiction of
"the Court. Moreover, it may be added in this connec-
"tion, that the bill of exceptions shows that the company
"notified the administrator of the pendency of this action,
"and gave him permission to use its name in any defense
"he might desire to make. This fact might not have been
"known to the Court when it decided the motion, but it
"shows, nevertheless, that the administrator has had a
"full opportunity to contest the right of the plaintiff to
"the insurance money under the answer of the defendant.
"But upon the merits, as we have before stated, we think
"the application was properly denied. For, if the plaint-
"iff showed, as she must do in order to recover, that the
"policy has been legally assigned to her by Allen A.
"Grant, and that she was entitled to the money due
"thereon, then the administrator had no interest what-
"ever in the controversy. And the Company had taken
"the requisite steps to protect itself against the liability
"to pay the policy twice, and was only interested in pay-
"ing it to the real owner. We, therefore, can see no rea-
"son why the relief asked in its answer, that the adminis-
"trator be made a party, should be granted."

In Robbins *vs.* Chicago, 4 Wallace 657, at 674, the following language is used:

"Persons notified of the pendency of a suit in which
"they are directly interested must exercise reasonable dil-
"igence in protecting their interest, and if, instead of
"doing so, they wilfully shut their eyes to the means of
"knowledge which they know are at hand to enable them
"to act efficiently, they cannot subsequently be allowed to
"turn round and evade the consequences which their own
"conduct and negligence have superinduced."

The obvious purpose of the clause of the treaty under

discussion was to provide a fixed and definite *law* and *forum* for the decision of all disputed successions in which the citizens of the several countries were interested.

It would be a narrow construction, indeed, that would confine it only to cases of *actual litigation between the claimants themselves*. Such a construction would in many cases cause infinitely more embarrassment than would the operation of the general rules of private international law.

Take, for example, a legacy of personalty in Hawaii left by a deceased citizen of the United States. Suppose that the will is void by the law of his domicil, but valid by the law of Hawaii. Or suppose that under the law of the testator's domicil one person answers the description in the will, and another by the law of Hawaii. Or suppose a citizen of the United States dies intestate as to personalty in Hawaii, and that by the law of the intestate's domicil the person to succeed as next-of-kin is not the person named by the law of Hawaii.

In all such cases, the question of disputed succession would be apt to arise in the first instance in an action by one of the parties *against the executor or administrator* of the decedent, not against the other claimant, or if the will is void under one law and valid under the other, the question might even arise between the executor and administrator of the decedent, the real beneficiaries not being parties at all.

In all these cases, should the treaty be held inapplicable to such litigation, the law of the decedent's domicil would control under the general rules of private international law, and the various actions above mentioned would be determined in accordance with that law.

Now observe what confusion would follow. The claimant, who was defeated in this litigation, would at once seek to recover the goods from the one to whom the Court (enforcing the law of the decedent's domicil) had given them,

and *then for the first time*, under this narrow and illiberal construction of the treaty, its provisions would become applicable. Under these provisions, the same Court that yesterday decided that the goods belonged to claimant A (enforcing the law of the decedent's domicil) would to-day be compelled to decide that they belonged to claimant B (enforcing the law of Hawaii where the goods are, as required by the treaty). A construction leading to such inconvenient and absurd results could not have been intended, when the whole purpose of the treaty is to simplify and expedite the settlement of disputed successions.

It is clear, therefore, that the clause of the treaty to the effect that "if a question should arise among several claimants as to which of them the said goods belong" does not require for its operation that there should be *actual litigation between the several claimants* touching the title to the goods.

It is submitted that the true meaning is, if in *any* litigation it becomes necessary to pass upon the title to a decedent's goods situated in Hawaii, claimed by a citizen of the United States, that title must be determined by the laws and judges of the land where the goods are, that is, by the laws and judges of Hawaii.

Hence, when McGrew's Administrator, "caring" for the decedent's estate in Hawaii for the benefit of the infant heir absent from Hawaii and a citizen of the United States, sued the insurance company upon the policy in Hawaii, and when the company raised the question of the title to the policy, claiming to retain it for Mrs. McGrew (also a citizen of the United States), the treaty at once sprang into full operation, and the laws and judges of Hawaii could alone determine the question.

But for the sake of argument, protesting however against such a restricted and inconvenient interpretation of the treaty, let us suppose that the clause under discussion does call for litigation *between the claimants* of the

goods. We would reply that such litigation has taken place in the Hawaiian courts, whose decision under the treaty must be regarded as "final."

Such litigation took place in the divorce suit between McGrew and his wife, which necessarily involved the title to the goods, *i. e.*, to the policy.

It again took place in the administrator's action against the Insurance Company which was prosecuted by the administrator as trustee for the infant son and which the company defended as *trustee for Mrs. McGrew* by urging her title. She was thereby substantially made a party to the litigation.

Even if Mrs. McGrew could not be regarded as substantially a party to this action, it is a sufficient compliance with this assumed requirement of the treaty that the company itself, as trustee for Mrs. McGrew, was a claimant.

II.

THE INSTANT THE CONSTITUTION OF THE UNITED STATES WENT INTO EFFECT, THE SUPREME COURT OF CALIFORNIA WAS BOUND BY IT TO GIVE FULL FAITH AND CREDIT TO THE DIVORCE DECREE AND PUBLIC ACTS OF HAWAII AND THE JUDGMENT IN THE ADMINISTRATOR'S ACTION, AS WELL AS BY THE TREATY.

"It seems clear from the authorities cited that the "Hawaiian Islands were a part of the territory of the "United States on the 16th day of August, 1898, as much "so as the State of Indiana or the Territory of New "Mexico" *Ex Parte* Edwards, 13 Hawaiian Rep., 32, 38).

"A further ground for believing that Congress did "not intend to fully extend the Constitution here or "fully incorporate these Islands as an integral part of the "United States is the construction put upon that Resolu-

" tion by Congress itself, as shown by the Organic Act of " April 30th, 1900. It was then and not until then that " Congress felt itself in a position to determine the status of " Hawaii " (*Ex Parte* Ah Oi, 13 Hawaiian Rep., 556).

(1.) *The Constitution of the United States protected the Company on account of the divorce decree.*

The divorce action to which Alphonsine McGrew was a party by personal service was commenced February 9, 1894, in Honolulu, and at that time Henri McGrew and his guardian Charles L. Carter, and the defendant Alphonsine were all domiciled in Honolulu (Rec., p. 15).

The policy itself was in Honolulu.

The question in that case was the right to a divorce by Henri McGrew, and flowing out of and incidental to that question, the further question of the ownership of the policy. The divorce action started the question whether Alphonsine McGrew had committed adultery and if so then Henri McGrew should hold such personal estate forever. The Hawaiian Court thus obtained jurisdiction of the policy, and this prevented it, or her contingent interest in it, from following the domicil of Alphonsine, if otherwise, it could have done so, and she could change her domicile, which we deny.

Civil Code Hawaii, Section 1331.

The defendant in error concedes in her brief here on the motion to dismiss the writ of error that the divorce case was one in which a question arose between the claimants, Henri McGrew and Alphonsine McGrew as to which of them the policy belonged. For on page 15 of such brief, she says:

" If the defendant in error was domiciled in California at the time of the decree of divorce, the Hawaiian Law forfeiting her title to this policy of insurance could not, under the treaty, take effect, because it was not the law of

the land wherein the said policy was. The law of the land wherein the said policy was situate, was the law of California, where the owner of the policy was domiciled."

The divorce decree finally determined that the policy belonged to Henri McGrew, and under the Constitution of the United States the Company was protected, and the Supreme Court of California erred in not reversing the judgment, because pending the appeal the Constitution of the United States, and the statute of 1904, passed in pursuance thereof, became operative upon the Hawaiian divorce judgment, and the Supreme Court of California was bound to give such judgment the same faith and credit as are given in Hawaii.

The effect of the divorce decree was to pass the title to the policy and that is the faith and credit given to the divorce decree in Hawaii. In the administrator's case (10 Hawaii, 117, 122, see Appendix, p. 1), the Court said:

"By this statute the interest of Alphonsine McGrew "under this policy passed *upon the divorce* to her hus- "band, and the insurance is now payable to the adminis- "trator of his estate. The policy and her interest under "it were personal estate, and, the contract having been "entered into in these islands, the divorce having been "granted here, and the parties having been domiciled "here, the beneficiary must be determined by the laws of "these islands."

And on the rehearing the Court said (see Appendix, p. ,):

"But however that may be, both parties were undoubt- "edly domiciled here when the divorce proceedings were "commenced, and when the Court acquired jurisdiction "over them, and that was sufficient so far as the question "of domicile was concerned. The Court having acquired "jurisdiction under these circumstances, the incidents of "the divorce would follow according to the law of the "place of the divorce."

No further judicial proceedings in Hawaii were necessary to vest the title in Henri. The divorce decree was sufficient. That was the faith and credit it had in Hawaii, and it must have been the same here.

So in a suit by Alphonsine against this Company in Hawaii the decree of divorce would have been a sufficient answer.

The Constitution of the United States required full faith and credit to be given to the decree in the divorce action in Hawaii.

In Laing *vs.* Rigley, 160 U. S., 544, it was held that under the constitution of the United States a New Jersey decree covering costs, counsel fees and alimony, was entitled to full faith and credit in New York.

In Lynde *vs.* Lynde, 181 U. S., 186: "The husband "* * * having appeared generally in answer to the "petition for alimony in the Court of Chancery in New "Jersey the decree of that Court for alimony was "binding upon him."

Bullock *vs.* Bullock, 57 New Jersey Law Reports, 508.

In the above case a decree for alimony was made by the Supreme Court of New York, where the Court had jurisdiction over the parties, and where the defendant was duly served with a process, and appeared and answered the bill of complaint in that Court, it was held that an action on such a decree will lie in New Jersey.

So the Court erred in not holding that the policy had been decreed to belong to Henri McGrew.

The Constitution requires full faith and credit to be given to the Hawaiian divorce statute.

The statute in question is not a penal statute in an international sense within the meaning of

Huntington *vs.* Attrill, 146 U. S., 657.

In the last case Mr. Justice Gray states that the question whether a statute of one State, which in some aspects may be called penal, is a penal law in the international sense, so that it cannot be enforced in the Courts of another State, depends upon the question whether its purpose is to punish an offence against the public justice of the State, or to afford a private remedy to a person injured by the wrongful act.

There has never been any change by this Court from the doctrine laid down in Huntington *vs.* Attrill.

One test of a strictly penal action is given in the Boston M. R. R. *vs.* Hurd, 108 Federal, p. 116, 119. The Massachusetts statute was involved punishing railway corporations by fine of from $500 to $5,000 for negligence causing death, to be recovered by indictment. The Court said:

"The most important one we have to deal with is whether the Massachusetts statute is strictly penal. It is not sufficient that it is in the nature of a penal statute. The distinction between a statute strictly penal, or *qui tam*, and one in the nature of a penal statute, is pointed out in Huntington *vs.* Attrill, 146 U. S., 657, 13 Sup. Ct., 224, 36 L. Ed., 1123. The proper test is that, if it is strictly penal, the remedy is subject to the control of the Executive of the State by which the proceeding was authorized, and it may be at any time, either before or after judgment, annulled by a pardon. That its essential nature in this respect is not changed by a judgment was determined in Wisconsin *v.* Pelican Ins. Co., 127 U. S., 265, 8 Sup. Ct., 32, 1370 L. Ed., 239."

In the case of the Hawaiian statute there is no question of course of the possibility of a pardon by the Executive, and in regard to the nature of the divorce case in Hawaii resulting in the title to the policy being transferred, such a result could not be obtained in any way by an action by the People or the State, or a *qui tam* action by an in-

former. That is, the matter is purely civil, or property matter arising out of the marital status.

The answer which counsel for Alphonsine made in the Court below was (before the Constitution went into effect) that the above Federal case of Huntington *v.* Attrill was binding on the California Court only when the question at issue was one which might be re-examined by the Supreme Court of the United States, on writ of error, and that the rule laid down in the Attrill case was not the rule in any State of the Union. Our proposition is therefore conceded.

The California Court did not pass on the point, for, in their opinion, they say:

"Under our view of the case it is not necessary to de-
"termine the points made by respondent, that the
"Hawaiian statute has no force here on the ground of
"comity, because it is penal, works a forfeiture, and
"is contrary to the public policy of this State, etc."

The constitutional provision includes the acts, records and judicial proceedings of TERRITORIES *of the United States.* The language of the Constitution of the United States is as follows:

"Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof" (Art. IV, Sec. 1).

By the Judiciary Act of 1790 (26th May, 1790, Chap. 11), Vol. 1, United States Statutes at Large, p. 122), Congress gave effect to this provision of the Constitution.

By the Act of March 27, 1804, (Chap. 56, Sec. 2, Vol. 2, United States Statutes at Large, at page 299), Congress amended the Act of 1790, extending the provisions of that act to the Territories as well as States. Section 1 of this

Act of 1804 provides the manner of authenticating judgments, etc. Section 2 is as follows:

"All provisions of this act, and the act to which this is a supplement, shall apply as well to the public acts, records, office books, judicial proceedings, Courts and offices of the respective territories of the United States, and countries subject to the jurisdiction of the United States, as to the public acts, records, office books, judicial proceedings, Courts and offices of the several States."

These Acts of 1790 and 1804 appear now in the Revised Statutes of the United States in Section 905 as follows:

"SEC. 905. The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory or country affixed thereto. The records and judicial proceedings of the Courts of any State or Territory, or of any such country, shall be proved or admitted in any other Court within the United States, by the attestation of the clerk, and the seal of the Court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every Court within the United States as they have by law or usage in the Courts of the State from which they are taken."

(2.) *The Supreme Court of California was bound always by the Treaty and after 1898 by the Constitution of the United States.*

Sec. 10 of the Act of April 30th, 1900, provides that all rights of action, suits at law and in equity, prosecutions and judgments existing prior to the taking effect of that act shall continue to be as effectual as if that act had not been passed.

31 U. S. Statutes at Large, 143.

This prevents the Treaty from being ineffectual as to all proceedings, etc., prior to 1900. The Supreme Court of California, therefore, should have applied the Treaty, and further the provisions of the Constitution.

The Supreme Court of California was bound to take notice of the change in the operation of the supreme law of the land effected by the annexation of Hawaii and the extension of the Constitution thereto. When judgment was rendered by the trial court in California, the law of California was supreme, subject only to the Treaty. But before the opinion of the Supreme Court was delivered the California law had ceased to be the controlling law, and the supreme law of the land had become applicable.

Had there merely been a change in the law of California, the court perhaps would not have been bound to apply the changed law, but the express mandate of the national constitution is that the constitution of the United States and the laws made in pursuance thereof are the supreme law of the land, and that the *judges* (appellate as well as trial judges) in each State shall be bound thereby.

Pugh *v.* McCormick, 14 Wallace, 361;
Fairfax *v.* Hunter, 7 Cranch., 603, 627;
U. S. *v.* Peggy, 1 Cranch., 103.

An analogous situation arose in regard to the constitutional amendment abolishing slavery.

In Whitehead *v.* Watson, 19 La. Ann., 68, the Court said:

"At the date of its rendition by the lower court, the "judgment appealed from was, in our opinion, in accord- "ance with positive law then in force; but now so much "of it as awards the slaves described therein and their pos- "session to the plaintiffs is absolutely null. * * *

"We think that under the Constitution and laws of the "United States and Louisiana this Court can render no "decree recognizing property in man."

In Stutsman Co. *v.* Wallace, 142 U. S., 293, this Court held as follows:

"This Court follows the construction by the highest "Court of a State, of its Constitution and laws, unless they "conflict with some provision of the Federal Constitution "or of a Federal statute or a rule of commercial law, and "this is so where the appeal is from the Supreme Court of "a territory if its decision is opposite to the subsequent "decision of the highest Court of the State which is created "from that territory."

In Price *v.* Nesbitt, 29 Md., 264, the Court held:

"That under Article IV, Section 9, the Constitution of "1864, and the Act of 1865, ch. 187, then in force, the "judgment of the Court was right and proper; but that "under Article IV, Section 8, of the Constitution of 1867, "and the Act of 1868, ch. 180, since enacted, and which "have largely extended the right of removal, the judg- "ment must be reversed and the party allowed to remove "the cause."

In Turner *v.* Bryan, 83 Md., 374, the Court states as follows:

"The ruling of the Court below was under the law as "it then stood, whereas the present appeal must be de- "cided by the existing law (Strauss *v.* Heiss, 48 Md., 293). "'It is a settled doctrine,' says this Court in Wade *et al. v.* "St. Mary's Industrial School, 43 Md., 181, 'that courts, "in deciding questions arising before them will look to "the law as it is at the time, and are not to be governed "by what it may have been, unless proceedings under a "prior existing law had been complete or rights had be- "come vested. This principle has been held to apply as "well to cases before an Appellate Court as to those that "are pending in courts of original jurisdiction (United "States *v.* Schr. *Peggy*, 1 Cranch., 103; Price *et al. v.* "Nesbitt, 29 Md., 264; Atwell *v.* Grant, 31 Md., 104; "State *v.* Norwood, 12 Md., 206; Keller *v.* State, 12 Md., "326).'

"But even if it be conceded there was error in the

" rulings of the Court below, inasmuch as the law in ex-
" istence at the time has been abrogated and repealed, the
" appellant has not been injured thereby. It therefore
" becomes unnecessary for us to pass upon the questions
" presented by this appeal, and it will be dismissed, the
" costs to be paid by Anne Arundel County."

In Ferry *v.* Campbell, 110 Iowa, 290 and 81 N.W. Rep., 605, the Iowa Supreme Court held that

" A judgment restraining the collection of an inherit-
" ance tax imposed by acts 26th General Assembly, c. 28,
" on the ground that such act was unconstitutional, is not
" a contract within the constitutional provision prohibit-
" ing the passage of any law impairing the obligation of
" contracts ; and hence such judgment might be properly
" reversed on appeal, where, pending such appeal, the
" legislature passed a retroactive law curing the defects in
" the prior act.

" Where, pending appeal from an order overruling a
" demurrer to a complaint, based on the contention that
" the statute on which the cause of action was based was
" unconstitutional, the legislature removed the defect by
" the passage of an amendment, the fact that the case was
" heard on demurrer, and presented to the Supreme
" Court on an assignment of errors, did not prevent the
" Appellate Court from deciding the appeal under the law
" as amended."

There cannot be any claim in this case that there was any vested right in the decision of the trial court of California. The point was simply that during the pendency of this case in the courts of California, the judgments in Hawaii were given full faith and credit under the constitution of the United States to which they had not been previously entitled. Under this constitutional provision there is no interference with the vested rights.

The fact that the Hawaiian judgment was rendered before annexation is immaterial. Upon the adoption of the Federal Constitution in 1789 and the passage of the Act of 1790, a State Court was bound to give full faith and credit

to the judgments of the courts of other States rendered prior to 1789. In other words, the rule of compulsory comity as to judgments of other States introduced by the Constitution was so applicable. The Constitution requires that full faith and credit shall be given to public acts, records and judicial proceedings of sister States. This is directed to future action of the judiciary. It is not a retro active provision and the case we cite below demonstrates this. Upon this identical principle the California Supreme Court was bound to give full faith and credit to a Hawaiian judgment rendered prior to annexation, for the annexation of Hawaii involved the application of the Constitution to it, and the legal effect upon prior Hawaiian judgments was the same as the effect of the adoption of the Federal Constitution in 1789 upon judgments of State courts rendered prior to said date.

This question is important in view of recent past and possible future annexations. But the question has been already decided.

Thus in the April Term, 1794, was decided the case of Armstrong *vs.* Carson's Executors, 2 Dallas, 302.

In this case a judgment having been obtained in the Supreme Court of the State of New Jersey, an action of debt was brought upon it in Pennsylvania, and the defendants pleaded *nil debent*. The contention was that the only question left open by the Constitution and Act of Congress was whether the Courts of New Jersey would sustain any other plea than *nul tiel* record, if the action in Pennsylvania had been brought in New Jersey. The Court, per WILSON, Justice, said :

"There can be no difficulty in this case. If the "plea would be bad in the Courts of New Jersey, it is "bad here; for, whatever doubts there might be on the "words of the Constitution, the Act of Congress effectu- "ally removes them; declaring in direct terms, that the "record shall have the same effect in this Court, as in the

" Court from which it was taken. In the Courts of New " Jersey no such plea would be sustained; and, there- " fore, it is inadmissible in any Court sitting in Pennsyl- " vania."

It may be stated here that Mr. Justice Wilson, who wrote the opinion in the above case, was one of the active framers of the Constitution.

The above case can be found in the docket of the Middle Circuit Court of the United States at Philadelphia, No. 16, April Sessions, 1792.

The following extract from the Narr discloses that the judgment was rendered in Trenton at the September Term, 1788, some six months before the Constitution of the United States took effect, viz., March 1st, 1789:

MIDDLE CIRCUIT COURT OF THE UNITED STATES OF AMERICA.

APRIL SESSIONS, 1792.

JOHN ARMSTRONG *vs.* JAMES READ, ROBERT MCCLAY and CHRISTIAN FEBIGER, Executors of Joseph Carson, deceased.	No. 16.

EXTRACT FROM NARR.

Filed February 18, 1793.

" That whereas the said John Armstrong heretofore, to " wit, in the term of September, in the year of our Lord " one thousand seven hundred and eighty-eight, in a cer-

"tain Court of Record called the Supreme Court of Ju-
"dicature of the State of New Jersey, before the Honor-
"able David Briarly, Esq., Chief Justice, and his associ-
"ate Justices of the said Court, to wit, at Philadelphia,
"in the said Pennsylvania District, by the consideration
"and judgment of the said Court, recovered against the
"said Joseph Carson in his lifetime a certain debt of
"seven hundred and fifty-one pounds eight shillings and
"eleven pences, lawful money of New Jersey, and also
"fifty pounds three shillings like money for his costs and
"charges by him about his suit in that behalf expended,
"to the said John Armstrong by the said Court of his as-
"sent adjudged, whereof the said Joseph Carson was con-
"victed, as by the record and proceedings thereof remain-
"ing in the said Court at Trenton aforesaid more fully
"appears, which said judgment still remains in that
"Court in full force, unreversed, unpaid and unsatisfied."

The above Armstrong case has been repeatedly cited with approbation (see Fed. Cases Nos. 959, 7169, 13785, 2179; 159 U. S., 182; 111 Fed., 572, and numerous like cases). That is, its treatment of pre-existing judgments has never been criticised, even though the precise point has not been again involved.

This Court, in order to prevent the injustice of compelling a second payment of an obligation which has already been paid under the protection of a judgment of the Supreme Court of a country, which is now a territory of the United States, should adjudge that the California Supreme Court erred in not giving to such judgment the faith and credit to which it was entitled.

No decision of any Federal Court has been found holding that a State Appellate Court is not bound to respect the supreme law of the land and apply it where such law becomes applicable pending an appeal.

(3.) *Alphonsine could not defeat the jurisdiction over the policy by travelling over to California.*

Alphonsine with her contingent interest could not by

change of domicile remove the "goods" from the jurisdiction of Hawaii.

Mrs. McGrew was a party to the divorce action. She could not change her domicile *pendente lite* so as to deprive the Court of jurisdiction over the personal property involved in that suit. There has been no case that we know of on this precise question referring to the effect of a decree of divorce upon personal property, *where a defendant has attempted to change her residence.*

The case of Barrett *v.* Failing, 3 Federal, p. 477, affirmed in 111 U. S., 523, 525, is not directly in point on this feature, because there the divorce was in California and the question arose in regard to the operation of the statutes of Oregon. In that case, however, referring to the specific clause in the Constitution, the Court says, *obiter dictum*

"the law of California, unlike that of this State, does "not provide that a decree of divorce shall work a trans- "fer or forfeiture of one third of the real property of the "one party to the other, and if it did could have no extra- "territorial effect, but would be confined in its operation "to the property of the parties within that State."

Of course this is upon the theory that in all matters affecting *land* the *lex rei sitæ* governs.

The statute of California could not determine title to lands in Oregon. As Mr. Justice Gray said in the opinion of the Supreme Court of the United States, the order "does not of itself transfer any title in real estate unless allowed that effect by the law of the place in which the *real estate* is situated." We are not dealing, however, with any *real estate* situated in California in this case, but with personal property actually situated in Hawaii.

The Supreme Court of Hawaii having decided that the decree had this effect against the extraordinary claim that the wife after *personal service* could defeat the jurisdic-

tion of the Court over the personalty by herself leaving the jurisdiction, the Supreme Court of California was bound by that (Appendix, p. 17).

No case can be found holding that a defendant wife personally served can *pendente lite* acquire a separate domicile for the purpose of defeating one of the incidents of the divorce case.

Alphonsine claimed nothing more than a mere change of *domicile pendente lite*. If the words "wherein the goods are" refer to the law of actual location, then the law of domicile has no application, and it is wholly immaterial whether her domicile changed or not.

The claim that a defendant wife can after service upon her remove herself from the jurisdiction so as to affect in any way the jurisdiction already acquired is preposterous, and therere is absolutely no shadow of an authority for such a propositio.n

On the possibility of changing her domicil pending the divorce case defendant in error cites Anderson *v.* Watt and Cheever *v.* Wilson. But there is absolutely nothing in these cases to support the proposition that a guilty wife can defeat the jurisdiction acquired over herself and property by fleeing from the forum. Cheever *v.* Wilson is the common case of a *plaintiff wife* acquiring a separate domicil. Alphonsine in California was *defending* the suit, *i. e.*, maintaining the marital relation. The unavoidable length of this brief prevents us from repeating here the arguments on the Hawaiian statute contained in the Record, pages 75-88.

Alphonsine took nothing actually with her that related in any way to this policy. The California Court decided that she took the "goods" with her to California, and in so deciding, the California Court nullified the terms of the treaty. The California Court, notwithstanding the treaty provides that the controversy shall be determined according to the stat-

utes and Courts of the place where the personal property is actually situated, decided that the same should be determined by the laws of the place where Alphonsine had her domicile and that by moving her domicile to California, that of itself gave to the California Court the power of final decision as to this property. which was manifest error.

In order to make the change of domicile material it is necessary to show that that law governs, and it manifestly does not.

The attempted change of domicile could not deprive the Hawaiian Court of jurisdiction over the contingent interest in the policy any more than it could change the grounds for the divorce itself. The matrimonial domicil was Hawaii, and the contingent interest of the husband whether dependent on death or divorce was governed by that law, Alphonsine could not change at her will. "All writers "it should be noticed, appear to admit that a change of "domicil does not affect the rights of husband or wife to "property fully acquired by either of them under the law "of their former divorce" (Dicey, 651). Property rights acquired from her husband during marriage are governed by the law of the matrimonial domicil, of which law the effect of a decree of divorce upon the property rights of the wife is one. How much less can a defendant wife affect her husband's rights and deprive the insurance company and her son of the benefits of the Treaty. As between the son and the mother clearly the son was entitled to the insurance.

Jurisdiction once acquired cannot be ousted by subsequent events.

Koppel *v.* Heinrichs, 1 Barb., 450.
Tindall *v.* Meeker, 1 Scamm., 137.
Hard *v.* Shipman, 6 Barb., 631.

"No change in the condition or residence of the par;

"ties can take away a jurisdiction which has once at-
"tached."

Upton *v.* N. J. So. R. R., 25 N. J. Cy., 375.

Alphonsine abducted the child from the jurisdiction, but she could not thereby deprive the Court of its jurisdiction to award the custody. She might, indeed, deprive the Court of the power of enforcing its decree, but could not affect its jurisdiction. In the case of the policy she neither deprived the Court of jurisdiction or of its power over the policy. The California Court has attempted by what Mr. Justice Brewer calls "fine spun theories about situs" (166 U. S., 225), to defeat for a time the treaty and the Constitution.

The actual physical location of the goods was not changed.

It is undisputed that at the time when the divorce suit was commenced and Alphonsine appeared therein, these "goods" or personal property, namely, the insurance policy, were located in Hawaii. The removal of Alphonsine from Hawaii to California did not change the location of this property.

The contention that Alphonsine became domiciled in California, and thereby defeated the jurisdiction of the Hawaiian Courts as to the policy involves the defendant in error in the difficulty that in such case from April 5, 1894, the question as to whom the goods belong arose under the treaty between Henri, a subject or citizen of Hawaii, and Alphonsine, a subject or citizen of the United States within the purview of the Treaty.

While the divorce suit was pending and on April 5, 1894, Alphonsine McGrew moved to California, and then changed her domicile, as claimed by her counsel here.

From that time on, then, *adopting defendant in error's*

contention, the divorce case and the question as to ownership of the policy were between a subject or citizen of Hawaii, and a subject of the United States, and the goods were in Hawaii.

When Alphonsine McGrew left Honolulu she could not by such leaving interfere with the binding action of the Hawaiian Courts, and the California Court so holds when it says "their construction of the statutes of their own country cannot be here assailed (McGrew *vs.* McGrew, 9 Hawaiian Reports, 475). Full effect must therefore be given to the judgment in the divorce suit," and again they say, "we are compelled to hold that the said judgment was final and conclusive as to the matter therein adjudicated" (Rec., fol. 193).

But if, as counsel claims, she became domiciled in California as a subject or citizen of the United States, then in addition to the binding effect of the Hawaiian decision *arose the operation of the treaty*, and the controversy going on in Honolulu involving the ownership of the policy, became one between a subject or citizen of Hawaii and a subject or citizen of the United States.

Construing the treaty by the rules of liberal construction already advanced, the words "subjects or citizens" must not be construed restrictively, or narrowly. Mrs. McGrew abandoned Hawaii permanently, and in August, 1895, the decree of divorce was procured against her. If, as counsel claims, she was after April 5, 1894, domiciled in California, then her *status* as a "subject" is governed by said domicile.

See The *Pizarro*, 2 Wheaton, 227, where it is said (p. 245):

"As to the second objection, it assumes, as its basis, "that the term 'subjects,' as used in the treaty, applies "only to persons who, by birth or naturalization, owe a "permanent allegiance to the Spanish government. It is, "in our opinion, very clear that such is not the true interpretation of the language. The provisions of the treaty

"are manifestly designed to give reciprocal and co-exten-
"sive privileges to both countries; and to effectuate this
"object, the term 'subjects,' when applied to persons ow-
"ing allegiance to Spain, must be construed in the same
"sense as the term 'citizens,' or 'inhabitants,' when ap-
"plied to persons owing allegiance to the United
"States. What demonstrates the entire propriety of
"this construction is, that in the 18th article of the
"treaty, the terms 'subjects,' 'people' and 'inhab-
"itants,' are indiscriminately used as synonymous to
"designate the same persons in both countries, and in
"cases obviously within the scope of the preceding
"articles. *Indeed, in the language of the law of nations,*
"*which is always to be consulted in the interpretation of*
"*treaties, a person domiciled in a country, and enjoying*
"*the protection of its sovereign, is deemed a subject of*
"*that country.* He owes allegiance to the country, while
"he resides in it: temporary, indeed, if he has not, by
"birth or naturalization, contracted a permanent alle-
"giance; but so fixed that, as to all other nations, he fol-
"lows the character of that country, in war as well as
"in peace. The mischiefs of a different construction would
"be very great; for it might then be contended that ships
"owned by Spanish subjects could be protected by the
"treaty, although they were domiciled in a foreign coun-
"try, with which we were at war; and yet the law of na-
"tions would, in such a predicament, pronounce them
"enemies. We should, therefore, have no hesitation in
"overruling this objection, even if it were proved that Mr.
"Hibberson was not a naturalized subject of Spain; but
"we think the presumption very strong that he had be-
"come, in the strictest sense of the words, a Spanish sub-
"ject."

See also United States *vs.* Chong Sam, 47 Fed., 885 (repeated), where the Court says:

"The argument is founded on the words 'any Chinese
"person, whether a subject of China or any other
"power,' but that phraseology is broadly descriptive of
"the race prohibited from entering, and forbids any ex-
"ception because of the political relation individuals of
"the race may hold to any country. In the language of

"the law of nations, as applied in the interpretation of "treaties, 'a person domiciled in a country, and enjoying "the protection of its sovereign, is deemed a subject of "that country.' The *Pizarro*, 2 Wheat., 246. It is in "this general sense that the word 'subject' is used in the "clauses referred to; not in its strictest meaning."

The *Friendschaft*, 3 Wheat., 114.
The *Venus*, 8 Cranch, 252.

The law will presume all persons domiciled in a country to be a citizen of that country;

State *vs.* Blackmo, 6 Blackf. (Ind.), 489,

and therefore, plaintiff in error having shown the domicile of the parties, cast the burden of proving they were not citizens on the other side.

This principle is shown by the recognition of domicile as the test of that citizenship necessary to confer jurisdiction upon the Federal Courts, since State citizenship follows domicile by operation of law.

Case *v.* Clarke, 5 Mason, 70.
Poppenhauser *v.* India Rubber Co., 14 Fed. Rep., 707.
Burnham *v.* Rangeley, 4 Fed. Cas., 775.

But this is immaterial as the question is not as to technical citizenship.

Assuming then for purposes of this argument that Alphonsine could change her matrimonial domicile, and become a subject or citizen of the United States on April 5, 1894, then the controversy in the divorce action as to the status of the parties, which included the status of this policy, was one between Henri as a subject and citizen of Hawaii, and Alphonsine as a subject and citizen of the United States, and the Treaty became operative and

the decision in the divorce case became binding upon the courts of California.

(4). *The Constitution of the United States protected the Company by reason of the judgment in the administrator's action, and the Supreme Court of California erred in not reversing the judgment because pending the appeal the Constitution of the United States and the statute of 1894 passed in pursuance thereof became operative upon the Hawaiian administrator's judgment and the Supreme Court of California was bound to give such judgment the same faith and credit as are given in Hawaii.*

This Company was under the Constitution protected by the judgment in the administrator's action.

Under the treaty the decision in the administrator's suit was binding on the California Courts, as the claim by the administrator based on the divorce decree had been finally settled by the laws and Judges of Hawaii wherein the policy was, and the money paid. The point is that under the Treaty the California Court was bound by the law as laid down by the Hawaiian Courts.

While this is not the case of a double payment to identically the *same person*, yet the principle stated by the Court in American Central Ins. Co. *v.* Hettler, 37 Neb., 853, is pertinent.

"Gary, P. J., says 'that the construction of the law "given by that Court might subject the plaintiff to the "payment of the debt twice.' With due respect to that "honored Judge, it seems to the writer that such a con- "struction is abhorent to our sense of justice. By what "right do the Courts—the conservators rights—sanction "the double payment of a debt, and indifferently fold "their arms and say in effect that 'it isnone of our bnsi- "ness'? It is the business of the Courts to administer

" justice as far as possible and protect and enforce the " rights of everyone."

Alphonsine could not have attacked the divorce decree and administrator's suit in Hawaii. They were binding on her. The same faith, credit and force should have been given to them in California.

It was not necessary to find that she should hav been a party to the administrator's suit, for she was to the divorce suit. The company fully represented her in the administrator's suit. The case is within the spirit of the following Hawaiian decisions :

In Kaleialii *v.* Grinbaum, 9 Hawaiian Reports, 213, it was held that a judgment—for the defendant—in an action brought by one to whom a promise was alleged to have been made for the benefit of another, will bar a second suit brought by the one for whose benefit the promise was alleged to have been made.

The Court said (p. 216): "It is not necessary that the " parties to the suits should be nominally the same; it is " sufficient if they are really and substanially the same in " interest."

In Jardin *v.* Madeiros, 9 Hawaiian Rep., 503, the Court said :

" After an examination of the pleadings and records in " this case and the first one pleaded in bar, it seems to us " that the question in issue, viz., the ownership of the " said cow, is the same in both cases, both cases being " replevin ; the parties were virtually the same, though " nominally different ; in this case the daughter suing " by her father, in the first case the father, who was the " nominal defendant, defending in right of his daughter, " he being by statute the natural guardian of her person " and property, and entitled to prosecute and defend all " actions in which she or her property may be concerned."

Mrs. McGrew acquiesced in the divorce, for she made no

claim in the probate proceedings. She allowed the estate to be administered in Hawaii without any claim there, that the divorce did not make the policy a part of her husband's assets.

She was not a necessary party to the administrator's suit in Hawaii, and the Court there so held. Suppose she had brought a suit herself in Hawaii. The Court would have been bound by the judgment in the administrator's action, on the principle of *stare decisis*, or the law of the case, even if not by *res adjudicata*. The Insurance Company litigated the question on behalf of Alponsine, and the Court held Alphonsine not a necessary party. It *must* have been protected therefore in Hawaii. If Alphonsine had sued the Company in Hawii, the Carter decree and judgment would have been a good defence. As the Court says in Matter of Opae, 10 Hawaiian, 188, the Judge is prohibited from changing his opinions by the general principles applicable to *res adjudicata*.

It is well settled that where the title to the same property upon the same state of facts is brought up again, the decision must be the same.

Kolb *vs.* Swann, 68 Md., 521.
Matter of Howard, 26 N. Y. Misc., 233.

This is not a simple case of one party suing a debtor in one jurisdiction, and another party suing the same debtor in another jurisdiction on the same debt. The administrator's suit is based on and flows out of the divorce case to which she was a party.

It is elementary, of course, that to entitle full faith and credit to be given, so as to make the judgment a bar, the Court must have jurisdiction of the cause and parties. But it is a different question whether this is the sole faith and credit. That is, we can enquire what would have been the effect in case Mrs. McGrew had sued in Hawaii, and if

the effect would have been to bar her, that effect must be given in California.

Had she sued the Company in Hawaii, the two judgments would have been a bar, because—

(1.) The matter was determined in the divorce case *to which she was a party.*

(2.) The Court had held she was not a necessary party to the administrator's action, and on the principle of *stare decisis*, or the law of the case, if not *res adjudicata*, her action in Hawaii would have been barred by reason of the two prior judgments. As the Court says in Haggerty *v.* Amory, 89 Mass., 462: "As the discharge of the defendant "might have been pleaded in bar to an action upon the "judgment in the State of New York and would there "constitute a good and complete defense to it, he has the "same right to plead it in defense to a *like* suit depending "in our courts, and it will there have the same force, "validity and effect to which it would have been entitled "in New York."

In the above Haggerty case a judgment was recovered in New York State, and afterwards the judgment debtor was discharged in bankruptcy there. The Court held the effect of his discharge as a defense in Massachusetts must be determined by the law of New York, saying (89 Mass., 459):

"And accordingly it is laid down as the settled law of "the land that any plea which would be good to avoid or "to afford a defence against a judgment in the state where "it was rendered, may be effectually pleaded in any other "state, in any action there commenced upon it (1 Kent "Com., 6th ed., 261; Shumway *v.* Stillman, 4 Cow, 292). "It was distinctly and emphatically declared by Marshall, "C. J., in the case of Hampton *v.* McConnel, 3 Wheat., "234, that the judgment of a state court is to have the "same credit, validity and effect in every other court in "the United States which it has in the state where it is

"pronounced, and that whatever pleas would be good in "a suit thereon, in such state, and none others, could be "pleaded in the courts in any other of the United States.

"In this state it has been determined, both in refer- "ence to judgments rendered here and those rendered in "the courts of other states where the law and course of "proceedings were, as it appears to have been assumed, "the same as in our own, that a discharge in insolvency, "procured subsequently to the rendition of a judgment "upon a cause of action which accrued prior to the peti- "tion of the debtor for the benefit of the statute, cannot "be pleaded in bar to an action upon such judgment "(Sampson *v.* Clark, 2 Cush., 173; Woodbury *v.* Perk- "ins, 5 Cush., 86; Faxon *v.* Baxter, 11 Cush., 35). But "these decisions are not applicable to and therefore can- "not control the present case, because the validity, force "and effect of the judgment declared on, and the defence "which may be made to do it, do not at all, as has already "been shown, depend upon the law of this commonwealth, "but upon that of the State of New York, where it was "rendered, and where the law and the course of proceed- "ing are essentially different from our own. If an action "for the recovery of a debt due is pending in our courts "when the debtor becomes a bankrupt and his estate is "duly transferred to assignees, it is, in accordance with "the uniform and settled practice of the courts, ordered, "on motion of the defendant, to be continued, that he may "have opportunity to obtain and plead his discharge. "But this practice has not been established or directly "authorized by the provisions of any statute, or even by "any positive and final decision of the court of last resort; "but has been acquiesced in as a reasonable rule, which "in its operation could hardly fail to afford adequate pro- "tection to the rights of all parties. No such rule appears "to have prevailed in the State of New York.

POINT VII.

Summary of argument that the laws and Judges of Hawaii had the final decision of this controversy, and that the Hawaiian proceedings and statutes were entitled to full faith and credit in California.

The argument in this brief has been directed towards demonstrating that the supreme law of the land which should have governed the California Court was the treaty and the Constitution of the United States. It was first shown that by the "laws and judges of the land wherein the said goods are" was intended the law and forum of the place where the goods were situated, sometimes known as the *lex situs* or *la loi de la situation*, and the forum *rei sitae*, and that this was agreed to be the law and the forum which should govern between the United States and Hawaii and that such law and forum were the deliberate selection by the governments of the two countries out of the various laws, and fora applied in the world's jurisprudence, namely, the *lex domicilii*, the *lex ligeantiae*, or *la loi nationale*, and the various possible fora.

It was then demonstrated that a policy of insurance could have an actual physical *situs*, so that the law of the land where the policy actually was could be applied, and that such was the intention of the treaty.

It was then shown that the policy at the time of the commencement of the divorce case was under every theory in the conflict of laws governed by the law of Hawaii.

Both at the time of the divorce and at the time of the commencement of the suit by the administrator against an American citizen, namely, The Mutual Life, in the course of the administration of the intestate's estate, the

policy was actually situated in Hawaii. In the suit therefore against The Mutual Life by Carter, Administrator, the Hawaiian Court was bound under the treaty to apply the law of the Hawaii, and the Hawaiian Court alone had jurisdiction.

When the company was sued in California, it was entitled to rest upon the protection afforded to it by the treaty on the ground that the California Court was bound by the Hawaiian law, and the California Court had no jurisdiction.

At the time the Supreme Court of California decided this case, the Constitution was in effect in Hawaii, and all the judicial proceedings, public acts and records of Hawaii were entitled to the same faith and credit in the Courts of California as they were entitled to in Hawaii. Had Mrs. McGrew sued this company in Hawaii, she would have had no claim to the policy, and the California Court had no jurisdiction and no power to do anything except give the same faith and credit to the proceedings in Hawaii. The question is what is the significance and effect of these decrees in Hawaii, to be determined by the decisions of the courts of Hawaii (Hancock Bk. *v.* Farnum, 176 U. S., 643).

The point urged by the counsel for the defendant-in-error that "no question has arisen among several claimants as to which of them said goods belong," and that therefore "the contingency that would bring the treaty into operation has never arrived" involves the claim that a "restrictive" and not a "liberal" construction should be placed upon the language of the treaty.

Henri McGrew had lived in Honolulu all his life except for a short time when he was in college (Record, fol. 58), and consequently was a subject or citizen of that country. The divorce decree passing the title to the policy was obtained there in a suit in which Alphonsine appeared per-

sonally. He died there, leaving as his next of kin his only son residing in San Francisco, and Carter was appointed his administrator by the courts of Hawaii. Carter, as such administrator, and in the course of the settlement of the estate, brought suit for the benefit of the absent heir or representative in the courts of Hawaii against this plaintiff-in-error, the Mutual Life Insurance Company of New York, a subject or citizen of the United States, and as such entitled to the benefits and protection conferred by the treaty. Carter, administrator, in that suit *claimed* that by the divorce decree the "goods" belonged to him as part of the estate of said Henri McGrew, and that Alphonsine McGrew had no interest or rights therein. The Insurance Company defended the suit and disputed the "claim" on behalf of Alphonsine, in the fullest and most exhaustive manner. The "question" came before the Hawaiian court to "decide" whether the "goods" belonged to the estate of Henri McGrew or to the defendant in error here, Alphonsine McGrew. The Hawaiian Court followed the divorce decree and "decided" the "claim" in favor of the plaintiff in that action and decided that under the divorce decree the "goods" belonged to the estate of Henri McGrew and not to Alphonsine. Judgment was thereupon entered in favor of Carter, administrator, and the Insurance Company paid the amount of the policy to him as such administrator, and he turned the proceeds over for the benefit of Henri's son.

Unless an exceedingly "restrictive construction" is placed upon this treaty a "question among claimants" did "arise" which was "decided" by the "laws and judges of the land" of Hawaii.

But, that is not all. After such decision, judgment and payment, Alphonsine brought this suit in the California State Court, and in that State Court she "claimed" the "goods" and demanded payment of the policy from

the said Insurance Company. The California State Court should have said to the plaintiff in that suit: "This Court has no authority to decide this 'claim.' The treaty between the United States and Hawaii and the Constitution of the United States takes from this court all power of deciding independently the 'claim' as to these 'goods' which have already been adjudicated. The treaty is the supreme law of the State of California. This court must be bound by the decisions of the Hawaiian Court already rendered as to any claim to these 'goods.'"

Such a decision is the only one the State Court, having respect to the treaty and Constitution could have rendered.

Any "question" between these "claimants" or any other "claimants" that may arise on the one hand, and the Insurance Company, a New York corporation, on the other, can be decided only by the "laws and judges of the land" of Hawaii, and such laws and judges have decided in favor of the estate of Henri McGrew.

It would be putting a very "restrictive construction" upon the treaty and would violate the Constitution of the United States for this Court to say that, because Alphonsine was not a party to the *administrator's* suit in Hawaii, even though a party to the divorce case which determined the title, notwithstanding the Insurance Company, a New York corporation, appeared and raised the "question" as to the "claim," as to whom "the said goods belonged," that therefore no "question arose among several claimants as to which of them said goods belonged."

The Courts of Hawaii in the divorce case decided that the policy belonged to Henri and decided against this New York corporation, that Carter, the administrator of Henri McGrew, "succeeded to" these "personal goods" for the son of Henri McGrew, and decided that said administrator

should "take possession thereof by himself" in accordance with the language of the treaty.

When it is considered that the "restrictive construction" if placed upon this treaty and an ignoring of the Constitution of the United States would result in compelling the Insurance Company to pay to *both* claimants, that is, to pay the amount of the policy *twice*, this Court should not go out of his way to place such a "restrictive construction" on the treaty or to ignore the Constitution of the United States so as to produce such an inequitable result.

The defendant in error raised the question, in her brief, whether the company had such an interest as is protected by the Treaty, and quotes some ejectment cases.

In Henderson *vs.* Tennessee, 10 How., 323, quoted by opposing counsel, the Court says: "To give jurisdiction to this Court the party must claim the right for himself, and not for a third person in whose title he has no interest."

We are not claiming the right for a third person in in whose title we have no interest. The claim of the company is that it was agreed between the United States and Hawaii that all claims respecting this policy and the proceeds thereof should by reason of the citizenship of the parties and the location of the goods in Hawaii be finally decided by the law of Hawaii and the forum of Hawaii; that by the law of Hawaii Henri McGrew was entitled, and that this has been so adjudged by the courts of Hawaii, and that this company, as an American citizen or subject, was bound by such treaty in the controversy in Hawaii, and is entitled to its protection, and that the California court is bound by the Hawaiian law in any controversy in California.

In the above case of Henderson *vs.* Tennessee, which was an action of ejectment, the defendant Henderson set up as a defense an outstanding title in a third person, and, as Chief Justice Taney says, if he had proved that such

third person had a better title than the plaintiff, it would have been a good defense. But the Court holds that while under the well settled law of ejectment a defendant may protect himself by asserting the rights of a stranger, of one not in privity with him or sustaining any legal relation to him, he cannot use the rights of such stranger as the ground upon which to base the jurisdiction of this court. The alleged rights of the stranger arose under a treaty between the United States and the Cherokee Indians, which provided that Cherokees electing to become citizens of the United States should be entitled to 640 acres of land.

In the case at bar the Insurance Company is not claiming *under any other person.* It claims immunity under the treaty in *its own right.* The status of our creditor was established in Hawaii, and our Treaty right is the protection we claim under it. Its legal relations with both Alphonsine McGrew and Henri McGrew were purely those of contract, of obligation. The only transfer of rights involved in this case is that of the contingent interest of Alphonsine McGrew in the policy to Henri McGrew effected by the divorce in Hawaii. Consequently all citations of ejectment cases or other cases involving real estate titles are wholly unapplicable. In none of the cases cited by the defendant-in-error upon this point, were the legal relations, past or present, of the litigating parties contractual. We claim that we are protected under the treaty.

It seems to have been the intention of Congress by the amendment of 1867, to the Judiciary Act, to enable this Court to protect the right and claims under a treaty, etc., from the effect of the errors of a State (Curt. Jur., U. S. Court, 2nd Ed., pp. 59–60), Court as to the erroneous rejection of evidence.

The two laws differ in the following particulars:

In defining the cases over which this appellate power shall extend.

In the earlier law one class of cases was described as

follows: "Or where is drawn in question *the construction* of any clause of the Constitution, or of a treaty or statute of, or commission held under the United States" This was the statute in 5 Cranch 344).

In the later law there is substituted the following fuller description: "Or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, etc."

The earlier law describes and includes only cases where some *question of construction* is drawn in question. The later law applies to and includes all cases where a privilege, immunity, etc., was claimed under the Constitution, etc., and the decision was against such claim, whether that decision rested upon some question of construction of the Constitution, or some law or treaty of the United States, or upon any other question entering into the decision of the State Court on the title capable of being assigned as erroneously made in contravention of law.

This latter description may include cases other than those embraced in the earlier law. The State Court may have decided against the claim, etc., without misconstruing the Constitution or any Act of Congress, and yet have made a decision erroneous in point of law in the judgment of the Appellate Tribunal.

It seems to have been intended to place titles, rights, privileges or immunities claimed under the Constitution, laws or treaties of the United States under the final guardianship of this Court, on whatever question of law the same might depend.

Will the United States Supreme Court compel this Insurance Company to pay a second time to the wife of the deceased the amount of this policy, when it has already paid the amount thereof for the benefit of the son of the deceased on judgments based on Hawaiian law which the proper rules of International law, the *treaty with the United States and the Constitution of the United States say shall be final?*

POINT VIII.

The judgment should be reversed and remanded to the State Court for a new trial in the light of the Treaty and Constitution as claimed herein.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
FREDERIC D. MCKENNEY,
W. H. CHICKERING,
WARREN GREGORY,
Of Counsel.

FILE COPY.

JAN 14 1903

Clerk.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1902.

No. 109.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,

Plaintiff in Error,

vs.

ALPHONSINE McGREW,

Defendant in Error.

IN ERROR TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

APPENDIX TO BRIEF OF PLAINTIFF IN ERROR.

I. Opinions of the Supreme Court of Hawaii in Carter, Admr., vs. The Mutual Life. Page I.

II. Specimens of Treaties between the U. S. and Foreign Countries Similar to the Hawaiian Treaty. Page XVIII.

III. Copies of Treaty Clause in Litigation here as it Appears in Foreign Languages in other Treaties. Page XXXII.

IV. Hawaiian Statute of Distributions, and Account of Carter, Admr. Page XXXVII.

V. Letter from French Consul on Language of Treaty. Page XL.

APPENDIX.

I.

Opinion of the Supreme Court of Hawaii in Carter administrator is The Mutual Life.

JOSEPH O. CARTER, Administrator of the Estate of HENRI G. McGREW, deceased,

vs.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

These opinions are reported in 10 Hawaiiain Reports, 117, 570.

QUESTIONS RESERVED BY CIRCUIT COURT, FIRST CIRCUIT.

Submitted July 12, 1895. Decided August 15, 1895.

JUDD, C. J., FREAR, J., and Mr. CECIL BROWN of the Bar, in place BICKERTON, J., absent from illness.

A policy of insurance was issued to M, payable upon his death to "A, wife of M, if living; if not living, to his executors, administrators or assigns." M afterwards obtained in the Circuit Court a decree of divorce from A for her adultery. A took exceptions to the decree, but did not get them certified to the Supreme Court. M subsequently died.

Held :

(1.) In an action at law by the administrator of M's estate on the policy A need not be made a party.

(2.) The decree of divorce was absolute and is still in effect.

(3.) Exceptions to the decree granting the divorce, so far as property rights were involved, might have been taken to and argued and determined in the Supreme Court, notwithstanding the death of the libellant.

(4.) The insurance, so far as the construction of the policy is concerned, is payable to A, notwithstanding the fact that she was not M's wife at the time of his death ; but,

(5.) By Civ. Code, Sec. 1331, A's interest in the policy passed upon the divorce to M to the administrator of whose estate the insurance is now payable.

Opinion of the Court by Frear, J.,

This is an action on a policy of insurance issued by the defendant company upon the life of Henri McGrew for $5,000 payable upon his death to "Alphonsine McGrew, wife of Henri G. McGrew, * * * * * if living ; if not living, to his executors, administrators or assigns." The company stands ready to pay the money, but desires that it be first judicially determined who is entitled to it—whether Alphonsine McGrew or the administrator of the insured. The doubt upon this point is occasioned by the fact that the insured, prior to his decease, obtained a decree of divorce from his wife on the ground of adultery, the validity and effect of which decree are questioned.

The contract of insurance was entered into in the Hawaiian Islands ; the policy is dated September, 14, 1892, it was issued to Henri G. McGrew, upon his ap-

plication; he retained possession of it and paid all premiums upon it; he died October 22, 1894; at the time of entering into the contract and until his death he was a subject and resident of and domiciled in these islands; J. O. Carter is the duly appointed administrator of his estate; all conditions and requirements necessary to be performed or complied with by the decedent or plaintiff have been performed and complied with.

The case was tried in the Circuit Court, First Circuit, jury waived, upon agreed facts, and comes here with the following questions reserved by the Circuit Court on motion of both parties:

1. Is Alphonsine McGrew a necessary party to this case?

2. Were H. G. McGrew and Alphonsine McGrew divorced; and if so, is the decree of divorce still in effect?

3. Is the amount due on Henry G. McGrew's insurance payable to J. O. Carter, administrator of the estate of H. G. McGrew?

First, this is not a suit in equity, as by bill of interpleader, but an action at law, and therefore, obviously not only is it unnecessary, but it would be improper, to make Alphonsine McGrew a party. This is practically conceded by the defendant.

Secondly, it appears by the agreed statement of facts, including the record in the divorce case, which is made a part of the agreed statement, that on the 24th of August, 1894, an absolute decree of divorce from the bond of matrimony was decreed by the Circuit Court, First Circuit, of the Hawaiian Islands, in favor of Henri G. McGrew against his wife, Alphonsine McGrew, for adultery on her part; that on the 27th of the same

month it was stipulated that it should not be incumbent upon libellee's counsel to present his bill of exceptions until one week after he had been furnished with a transcript of the evidence; that on the 24th of September following he was furnished with such transcript; that on the 1st of October following he filed a paper purporting to be a bill of exceptions; that on the next day libellant's counsel moved the Supreme Court to set the cause for hearing on the alleged bill of exceptions, but that libellee's counsel objected on the ground that the bill had not been signed or allowed by the Circuit Court, and that the motion was denied on that ground; that Henri G. McGrew died on the 22d of the same month; and that no bill of exceptions was ever allowed by the Circuit Court.

The statute (Comp. L., p., 437) provides that in matters of divorce, "Any party aggrieved by any order or decision of the Circuit Court, may except thereto, and his exceptions shall be duly noted, and certified to the Supreme Court, and no order or decree for a divorce shall be made absolute until such exceptions shall have been disposed of. Said exceptions shall be argued and determined in the Supreme Court, sitting in banco, and if the Court in banco shall be of opinion that the order or decision excepted to in said Circuit Court was erroneous, they shall so certify, and thereupon the case shall be heard anew."

It argued in the first place that the decree of divorce never became absolute because the alleged exceptions were never argued and determined in the Supreme Court.

The practice here in divorce as in other law cases has usually been to enter at once in the Circuit Court an absolute decree or judgment, which is subject to be set aside by the Supreme Court on exceptions. This is what is meant by the provisions of the statute that

"no order or decree for a divorce shall be made absolute until such exceptions have been disposed of." An absolute decree is made at once, but, if excepted to, it may be set aside by the Supreme Court. If not excepted to, it is and remains absolute. This has been the construction placed upon the statute in practice and is in harmony with the more general provisions and the practice thereunder, relating to exceptions in all law cases (Laws of 1892, Ch. 57, Secs. 72–78). The "exceptions" referred to in the statute are "exceptions allowed" or "certified to the Supreme Court." If they were merely exceptions alleged to have been made by counsel, whether allowed or certified or not by the Court, and if no absolute decree could be made until such exceptions were argued and determined in the Supreme Court it would be in the power of the party against whom a decree of divorce has been made to forever prevent the decree from becoming absolute by merely filing alleged exceptions, perhaps wholly "unconformable to truth," and never following them up, or attempting to have them allowed or certified, but on the contrary resisting all endeavors on the part of the opposite party to have them disposed of. In this case it appears that no exceptions have ever been allowed or certified to the Supreme Court, and from all the circumstances, it would seem that the libelee had abandoned her intention, if she ever had any, of getting any exceptions allowed if she could, and having them argued and determined in the Supreme Court.

But it is further argued that the divorce case was abated by the death of Henri G. McGrew, and that even if the libelee had desired to take further action on her alleged exceptions she could not have done so. It seems to us that if the libelee had not for other reasons lost her right to take the case to the Supreme Court on exceptions, she might have done so even after the death of

the libellant. Such seems to be the current of authority as to decrees granting divorces in so far as property rights are involved. See Shafer *v.* Shafer, 30 Mich., 163; Downer *v.* Howard, 44 Wis., 82; Wren *v.* Moss, 7 Ill., 72; Danforth *v.* Danforth, 111 Ill., 236; Thomas *v.* Thomas, 57 Md., 504, referred to in 5 Am. & Eng. Enc., 773, Wilson *v.* Wilson, 73 Mich., 620; Barney *v.* Barney, 14 Ia., 189; Kimball *v.* Kimball, 44 N. H., 122.

Thirdly, assuming, then, that the parties were divorced, who is entitled to the insurance? It is argued that since it is payable to "Alphonsine McGrew, wife of Henri McGrew," payment to her is conditioned upon her being his wife at the time of his death, and that since a divorce had taken place she was not then his wife. No such condition can fairly be implied from the words of the policy. The insurance is payable to the person named, "Alphonsine McGrew," and the only condition annexed to the payment to her is that she shall be living at the time of the death of the insured. The words are, "if living." The words "wife of Henri G. McGrew" are words merely of description, not of condition. What provision the insured might have made, had he contemplated the possibility of a divorce is not for us to say or to give effect to. The policy must be construed as it is. That the word "wife" as here used is mere descriptive, and that the insurable interest of the beneficiary need not continue, or that there need not even be an insurable interest in the first place, the insurance having been effected by the insured and not by the beneficiary (see Conn., &c., Co. *vs.* Schaefer, 94 U. S., 457; Vivar *vs.* Knights of Pythias, 52 N. J. Eq., 455; McKee *vs.* The Phœnix, &c., Co., 28 Mo., 383; Overbeck *vs.* Overbeck, 155 Pa. St., 5.

But it is provided by statute (Civil Code, Sect. 1331) that "when a divorce is decreed for the adultery or

other offence amounting thereto, of the wife, the husband shall hold her personal estate forever." By this statute, the interest of Alphonsine McGrew under this policy passed upon the divorce to her husband, and the insurance is now payable to the administrator of his estate. The policy and her interest under it were personal estate, and, the contract having been entered into in these islands, the divorce having been granted here, and the parties having been domiciled here, the beneficiary must be determined by the laws of these islands.

The first question reserved must be answered in the negative, the other two questions in the affirmative, and the case is remanded to the Circuit Court for such further proceedings as may be proper.

CARTER & KINNEY for Plaintiff.
W. R. CASTLE for Defendant.

J. O. CARTER, Administrator of the Estate of H. G. McGrew, deceased

v.

THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

MOTION OF REHEARING

Submitted March 11, 1896.
Decided December 19, 1896.

JUDD, C. J., FREAR, J., and CECIL BROWN, Esq., of the Bar, in place of WHITING, J., disqualified.

The question of the effect of a divorce upon the ownership of a policy of life insurance, or the right to the

proceeds thereof, is not a question of the construction of the policy.

The provision in an application for life insurance that it is made "subject to the charter of the Company and the laws of the State of New York," is not an agreement that the question of the effect of a foreign divorce upon the ownership of the policy or the proceeds thereof shall be determined by the statutory law of New York.

By private international law the effect of such divorce should be determined by the law of the place of domicil and divorce.

A rehearing will not be granted for argument by new counsel upon a question raised at the first hearing but which former counsel chose not to argue, at least if it does not appear that a new argument would probably lead to a different result.

A rehearing will not be granted in order to allow argument upon a question of the constitutionality of a statute, even though that question was not argued at the first hearing, where the unconstitutionality of the statute was not made a ground of the motion for a rehearing and it does not appear that an argument upon the question would probably lead to a reversal of the decision.

Where a Court has acquired jurisdiction in divorce proceedings over both parties at the place o their domicil and afterwards decrees a divorce, the effect of the divorce upon the disposition of the personal estate of the wife will not be affected by a change of residence of the wife previous to the signing of the decree.

Opinion of the Court by Frear, J.

The former decision, *ante*, p. 117, in this case was filed August 15, 1895. On October 4, 1895, new counsel for the defendant filed a motion for a rehearing, based

on a number of grounds therein set forth. On March 6, 1896, he filed additional grounds. Opposing counsel objected to the Court's entertaining the motion on the grounds of defendant's laches in filing the same and its acquiescence in the judgment. Affidavits were filed on both sides. The Court thought it best to hear argument upon the motion itself as well as upon the preliminary question of laches and acquiescence, and now, in view of all the circumstances and of our conclusion, we believe it will be more satisfactory to consider the motion entirely upon its merits, without going into the question of laches and acquiescence at all.

The points relied upon by the defendant's counsel in his able and elaborate brief will be considered in their order. We regretted much at the first hearing that we were not thus favored with full argument on behalf of the defendant, except upon one of the many interesting questions involved in the case and at that time argued by plaintiff's counsel or suggested by the Court. The decision was rendered at an early date, as requested on behalf of the defendant, in such a light as the Court then had, and yet in the light of the full argument now presented, we do not find sufficient ground for allowing a rehearing. We come to this conclusion fully realizing both that if a rehearing should be granted, it would by no means imply that the former decision was erroneous, and that the merits of the case are not involved in the disposal of the motion, although, as found by counsel in argument, the merits must necessarily be considered to some extent.

The first point relied on is, that the Court manifestly erred in construing the policy as an Hawaiian contract, whereas, it appears upon its face to be a New York contract. The case was submitted upon an agreed statement of facts in which it was expressly agreed that the "contract of insurance was made and entered

into in the Hawaiian Islands." This is all that was assumed in the decision, namely, in the words, "the contract having been entered into in these islands." But it is argued that the agreed statement cannot be construed as an admission that the policy was an Hawaiian contract. If so, the decision also cannot be construed as holding that, for its language is that of the agreed statement.

It is further argued that, if the agreed statement does contain such admission, then counsel, who signed it, exceeded his authority in so doing and the defendant is not bound thereby. If the statement did contain such admission, the Court would have been perfectly justified in acting upon it. When a case is submitted to the Court upon an agreed statement of facts signed by responsible counsel, it certainly would not be the duty of the Court, it would not be proper to assume that counsel was acting without authority and then decide the case upon the facts directly contrary to those upon which the case was submitted, and especially where as in this case the admission if made, might under certain circumstances be in accordance with the facts notwithstanding the particular language of the policy or other documents before the Court. But it is unnecessary to decide whether the agreed statement did contain such admission, or if it did, whether an attorney at law could as such properly make such an admission, or if not, whether such admission, if made, was in fact authorized or acquiesced in by the defendant itself. For the Court did not as a matter of fact construe the policy as a Hawaiian contract. It construed it precisely as requested by defendant's counsel (holding that the word "wife" in the policy was a word of description, not of condition) in accordance with the judicial decisions elsewhere in similar cases, which so far as appears would be followed in New York as well as in Hawaii.

Not a single New York decision or statute was then cited upon this point by counsel on either side, but it was assumed by the Court and by counsel on both sides that the law upon this question was the same in New York as elsewhere, and the view taken by the Court as to what that law is, is conceded by defendant's present counsel to be correct. It is true the Court spoke of the contract as "entered into in these islands," but even if those words should be construed as holding that the policy was a Hawaiian contract (a construction which defendant's counsel argues cannot be placed upon similar words in the agreed statement) still the words were inserted in the decision merely for what they were worth. They were not then and are not now regarded by the Court as of much importance. The facts of importance, stated in the same sentence, were that the divorce was granted and the parties were domiciled here. Even these facts were not alluded to as having any bearing upon the question of the construction of the policy. The Court had finished its comment upon that question and was then upon the question of ownership. And this seems to be the source of misunderstanding in this case. Construction is confused with ownership. If A had possession of certain personal property under a contract it might be a question of the construction of the contract whether A's interest was, in his own right, and if so, what that interest was, or, if A had died, it might be a question of construction whether the property should then pass to A's representatives or to someone else. These questions would be decided by the law of the place of contract. But suppose the contract was construed as having passed the property absolutely to A and his representatives, the further question who were the representatives would be one, not of construction, but of distribution, to be solved by the law of the place, not of the contract, but

of A's domicil. Or, suppose A had previously assigned the property, his representatives would not take it all—not because of an erroneous construction of the contract by the law of domicil, or any other law, but because the ownership of the property had changed—a question which might necessarily be determined by some other law, as the law of the place of assignment, if that were a different place. So, if A had become bankrupt and the property had become assigned by operation of law to his assignee in bankruptcy. So, if A had married and the property had passed by law to her husband, so, as in this case, if a divorce had been obtained against her, and the property had thereupon passed to her husband by operation of law. To allow an assignee of a contract to recover, is not to vary the terms of the original contract, but to enforce the terms of the contract of assignment.

It is further argued, that, if the mere fact that the policy is a New York contract is not sufficient to require the New York law to govern in determining the question of assignment by operation of law, as distinguished from the question of construction, yet it is expressly provided in the policy that the New York law should govern and it was competent for the parties to so agree. Let us assume that such an agreement, if made, would have been valid. The provision referred to is not in the policy proper, a copy of which was before the Court, but in the application, which, although in terms made a part of the policy, was not before the Court and had not to this day been seen by the Court. This provision is stated in the brief as follows: "This application is made to the Mutual Life Insurance Co. of New York, subject to the Charter of the Company and the laws of the State of New York." An application which the parties themselves did not make a part of the case and which the Court had never had an opportunity of see-

ing, could not be considered. Even if it had been a part of the case, the Court would still have been in the dark as to the provisions of "the Charter of the Company and the laws of the State of New York," no proof of which was made. In the present counsel's brief, to be sure, reference is made to an old New York statute differing slightly from our own former statute upon the subject under consideration, but no such reference was made at the first hearing, and if it had been made, would it have been sufficient proof of what the New York law is at present, and might not the charter have contained some other provisions, for, if the parties may have agreed that the property in the policy should pass in a manner different from that prescribed by Hawaiian law, may they not also have agreed similarly as to New York law? But, aside from all this, we do not see how an agreement that the application is made subject to the charter of the company and the laws of the State of New York, can be construed as an agreement that the ownership of the policy itself after it has issued or the right to the proceeds thereof should be determined by that charter or those laws. Not merely because the application is not the policy, though part of it, for even if the policy itself had been issued expressly subject to the same charter and laws (and it probably was issued thereto whether expressly so stated or not) this could not mean that the New York statutory law should govern every question that might subsequently arise in relation to the policy—its ownership, the court in which or the procedure by which it should be enforced, the persons who would be the insured representatives in case he survived his wife, &c. Indeed, New York law must be assumed to include provate international law, by which the effect of a divorce upon the ownership of personal property is determined by the law of the place of divorce at least if that is also

the place of domicil—the New York statute upon the subject so far as it relates to personal property being presumed to apply only to divorces granted in that State. In considering this question, should be borne in mind that the specific provision in the policy relating to assignment is not involved.

The company, not having brought the widow into court by interpleader, is in the unfortunate position of being subjected to two suits—one by the administrator here, the other by the widow in California. It must now rely upon the assumption that the two courts will take the same view of the law. There can be no doubt that the same law should govern whether the action is brought in Hawaii, California or New York. In our opinion that law is the law of the place of domicil and divorce. We can only assume that the California Court will take the same view.

The next point relied on is that, if Hawaiian law, that is, the law of the place of domicil and divorce, is to govern, that law did not pass the policy in question to the husband. The statute (Civ. Code, Section 1331) provided that "when a divorce is decreed for the adultery * * * of the wife, the husband shall hold her personal estate forever * * *" The argument is that, as the Court has held that the former statute (Civ. Code, Section 1286), upon the rights of husband and wife, which made the husband "the virtual owner" of the "movable property" of his wife, was substantially an enactment of the common law upon the subject, and therefore did not pass the wife's choses in action to the husband until reduced to possession by him, so it must by analogy hold that under the statute now in question the wife's choses in action did not pass to the husband under the description of "personal estate" until reduced to possession, and that as the husband did not in this case reduce the policy in question to

possession during his lifetime the wife was entitled to it. The question whether the policy was "personal estate" within the meaning of the statute was argued by counsel for the plaintiff at the former hearing, and was considered and decided by the Court, though this particular phase of the argument was not gone into. A rehearing should not be granted merely to allow new counsel for the defendant to present argument upon a question raised at the first hearing, but which former counsel for the defendant then chose not to argue, at least where, as we believe to be the case here, a rehearing would probably not result in a different decision. For, even if it could be assumed from the facts agreed upon that the husband had not reduced the policy to possession during his lifetime, still the statute in question could not, like the other statute referred to, be presumed to have been intended to be an enactment of the common law, so as to be subject to the alleged exception relating to choses in action, for the common law upon this subject was totally different; it did not allow the husband to reduce to possession his wife's choses in action after divorce at all; after divorce he is no longer husband; his right to the wife's choses in action then is not a marital right; marital rights no longer exist; the right is one of property under the statute. The words "personal estate" used in the statute naturally include all personal estate, whether in action or possession.

The next point relied on is that the statute in question (Section 1331) was repealed by implication by the Married Woman's Act of 1888. This point was considered by the Court before rendering its decision, and, if we remember rightly, was also suggested to counsel at the hearing, but was not touched upon in the decision because counsel had not cared to argue it. Very probably the Legislature which passed the Act of 1889 eman-

cipating married women from the harsh provisions of the common law would have also repealed the section in question if it had been brought to its notice. But this is only a matter of probability as to what would have been done. It was not, in fact, done. The section is not inconsistent with that Act. It may be regarded as a special provision for a penalty or forfeiture in case of a divorce for the offense of adultery. We are glad to note that the section has since been repealed by an Act introduced by Senator Brown, who, as substitute Judge, took part in the former decision and now takes part in this.

The point made in the brief that Section 1331 is unconstitutional was not made a ground in the motion for rehearing. We need only add that we fail to see the force of the learned argument upon this point.

The next point is that Section 1331 did not apply to the property in question, because at the time of the divorce neither the wife nor the policy were in this country or within the jurisdiction of the Court—the wife because she had gone to California, the policy because, although it remained here in the possession of the husband, being personal property it followed its owner, the wife, in contemplation of law. We presume that by this is meant, not that personal property follows its owner wherever the latter may happen to go temporarily, but that it is governed by the law of the owner's domicil, or residence *animo manendi*. Now there was no proof whatever that the wife in this case intended to change her domicil, which had previously been here, and which in the absence of proof to the contrary would, at least after so short an absence, be presumed to continued here, to say nothing of the rule that the wife's domicil is that of her husband, except under certain special circumstances. But however that may be, both parties were undoubtedly domiciled here when

the divorce proceedings were commenced, and when the Court acquired jurisdiction over them, and that was sufficient so far as the question of domicil was concerned. The Court having acquired jurisdiction under these circumstances, the incidents of the divorce would follow according to the law of the place of divorce.

Finally, it is argued that the divorce had not become absolute because the exceptions taken in the divorce proceedings had not been disposed of (Comp. L., p. 437). The construction of this statute was argued and decided at the first hearing, and we are practically asked to go over the same ground again. The only criticism made upon the former decision of this question is based upon a misconstruction of that decision.

The motion for a rehearing is denied.

W. A. KINNEY, for plaintiff.

L. A. THURSTON, for defendant.

II.

Specimens of Treaties between the U. S. and Foreign Countries similiar to the Hawaiian Treaty.

BAVARIA, 1845.

ARTICLE II.

Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof, without molestation and exempt from all duties of detraction.

ARTICLE III.

The citizens or subjects of each of the contracting parties shall have power to dispose of their (real and) personal property within the States of the other, by testament, donation, or otherwise; and their heirs, legatees, and donees, being citizens or subjects of the other contracting party, shall succeed to their said (real and) personal property, and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases.

ARTICLE IV.

In case of the absence of the heirs, the same care shall be taken provisionally of such real or personal property as would be taken in a like case of property belonging to the natives of the country, until the lawful owner, or the person who has the right to sell the same, according to Article II, may take measures to receive or dispose of the inheritance.

ARTICLE V.

If any dispute should arise between different claimants to the same inheritance, they shall be decided in the last resort according to the laws, and by the judges of the country where the property is situated.

TWO SICILIES, 1845, ART. VI.

* * * * * *

They shall be entitled to * * * dispose of their personal property of every kind and description, by sale, gift, exchange, will, or in any other way whatever, without the smallest hindrance or obstacle; and their heirs or representatives, being subjects or citizens of the other high contracting party, shall succeed to their personal goods, whether by testament or *ab intestato;* and may take possession thereof, either by themselves or by others acting for them, and dispose of the same at will, paying to the profit of the respective governments such dues only as the inhabitants of the country wherein the said goods are shall be subject to pay in like cases. And in case of the absence of the heir and representative, such care shall be taken of said goods as would be taken of the goods of a native of the same country in like case, until the lawful owner may take measures for receiving them. And if a

question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are.

They shall not be obliged to pay, under any pretense whatever, any taxes and impositions, other or greater than those which are paid or may hereafter be paid by the subjects or citizens of the most favored nations, in the respective States of the high contracting parties.

SAXONY, 1845.

Article II.

Where, on the death of any person holding real property within the territories of one party, such real property would by the laws of the land descend on a citizen or subject of the other, were he not disqualified by alienage, or where such real property has been devised by last will and testament to such citizen or subject, he shall be allowed a term of two years from the death of such person—which term may be reasonably prolonged according to circumstances—to sell the same and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction on the part of the Government of the respective States.

Article III.

The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property within the States of the other, by testament, donation, or otherwise; and their heirs, being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or *ab intestato*, and may take possession thereof, either

by themselves or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases.

ARTICLE IV.

In case of the absence of the heirs, the same care shall be taken, provisionally, of such real or personal property as would be taken, in a like case, of the property belonging to the natives of the country, until the lawful owner, or the person who has a right to sell the same, according to Article II, may take measures to receive or dispose of the inheritance.

ARTICLE V.

If any dispute should arise between the different claimants to the same inheritance, they shall be decided according to the laws and by the judges of the country where the property is situated.

NASSAU, 1846.

ARTICLE II.

Where, on the death of any person holding real property within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a term of two years to sell the same—which term may be reasonably prolonged according to circumstances—and to withdraw the proceeds thereof without molestation, and exempt from all duties of detraction.

ARTICLE III.

The citizens or subjects of each of the contracting parties shall have power to dispose of their personal property, within the States of the other, by testament, donation, or otherwise, and their heirs, legatees and donees, being citizens or subjects of the other contracting party, shall succeed to their said personal property, and may take possession thereof, either by themselves, or by others acting for them, and dispose of the same at their pleasure, paying such duties only as the inhabitants of the country where the said property lies shall be liable to pay in like cases.

ARTICLE IV.

In case of the absence of the heirs, the same care shall be taken, provisionally, of such real or personal property as would be taken in a like case of property belonging to the natives of the country, until the lawful owner, or the person who has a right to sell the same, according to Article II, may take measures to receive or dispose of the inheritance.

ARTICLE V.

If any dispute should arise between different claimants to the same inheritance, they shall be decided, in the last resort, according to the laws and by the judges of the country where the property is situated

HANOVER, 1846, ART. X.

* * * * * *

The citizens or subjects of each party shall have power to dispose of their personal property within the jurisdiction of the other by sale, donation, testament or otherwise.

Their personal representatives being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or *ab intestato*.

They may take possession thereof either by themselves or by others acting for them, at their will, and dispose of the same, paying such duty only as the inhabitants of the country wherein the said personal property is situate shall be subject to pay in like cases.

In case of the absence of the personal representatives, the same care shall be taken of the said property as would be taken of the property of a native in like case, until the lawful owner may take measures for receiving it.

If any question should arise among several claimants to which of them the said property belongs, the same shall be finally decided by the laws and judges of the country wherein it is situate.

Where, on the decease of any person holding real estate within the territories of one party, such real estate would by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective States.

MECKLENBURG, &c., ART. X (1847).

* * * * * *

The citizens or subjects of each party shall have power to dispose of their personal property within the jurisdiction of the other by sale, donation, testament, or otherwise.

Their personal representatives, being citizens or subjects of the other contracting party, shall succeed to their said personal property, whether by testament or *ab intestato*. They may take possession thereof, either by themselves or by others acting for them, at their will, and dispose of the same, paying such duty only as the inhabitants of the country wherein the said personal property is situated shall be subject to pay in like cases. In the case of the absence of the personal representatives, the same care shall be taken of the said property as would be taken of a property of a native in like case, until the lawful owner may take measures for receiving it.

If any question should arise among several claimants to which of them the said property belongs, the same shall be finally decided by the laws and judges of the country wherein it is situated.

Where, on the decease of any person holding real estate within the territories of one party, such real estate would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by alienage, such citizen or subject shall be allowed a reasonable time to sell the same, and to withdraw the proceeds without molestation, and exempt from all duties of detraction on the part of the government of the respective States.

SWITZERLAND, 1847.

Article I.

The citizens of each one of the high contracting parties shall have power to dispose of their personal property, within the jurisdiction of the other, either by testament, donation, or *ab intestato*, or in any other manner; and their heirs, being citizens of the other

party, shall inherit all such personal estates, whether by testament or *ab intestato*, and they may take possession of the same, either personally or by attorney, and dispose of them as they may think proper, paying to the respective governments no other charges than those to which the inhabitants of the country in which the said property shall be found would be liable in a similar case; and in the absence of such heir, or heirs, the same care shall be taken of the property that would be taken in the like case for the preservation of the property of a citizen of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same; and in case any dispute should arise between claimants to the same succession as to the property thereof, the question shall be decided according to the laws, and by the judges, of the country in which the property is situated.

ARTICLE II.

If, by the death of a person owning real property in the territory of one of the high contracting parties, such property should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a term of not less than three years shall be allowed to him to dispose of such property, and collect and withdraw the proceeds thereof, without paying to the Government any other charges than those which in a similar case would be paid by an inhabitant of the country in which such real property may be situated.

SWITZERLAND, 1850.

Article V.

The citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other, by sale, testament, donation, or in any other manner; and their heirs, whether by testament or *ab intestato*, or their successors, being citizens of the other party, shall succeed to the said property, or inherit it, and they may take possession thereof, either by themselves or by others acting for them; they may dispose of the same as they may think proper, paying no other charges than those to which the inhabitants of the country wherein the said property is situated shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors, the same care shall be taken by the authorities for the preservation of the property that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.

The foregoing provisions shall be applicable to real estate situated within the States of the American Union, or within the Cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate.

But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the Canton in which it may be situated, there shall be accorded to the said heir, or other successor, such term as the laws of State or Canton will permit to sell such property; he shall be at liberty

at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the Government any other charges than those which in a similar case would be paid by an inhabitant of the country in which the real estate may be situated.

ARTICLE VI.

Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated.

BRUNSWICK, &c., 1854.

ARTICLE I.

The citizens of each one of the high contracting parties shall have power to dispose of their personal property, within the jurisdiction of the other, subject to the laws of the State or country where the domicil is, or the property is found, either by testament, donation, or *ab intestato*, or in any other manner; and their heirs, being citizens of the other party, shall inherit all such personal estates, whether by testament or *ab intestato*, and they may take possession of the same, either personally or by attorney, and dispose of them as they may think proper, paying to the respective governments no other charges than those to which the inhabitants of the country in which the said property shall be found would be liable in a similar case; and in the absence of such heir or heirs the same care shall be taken of the property that would be taken, in the like case, for the preservation of the property of a citizen of the same country, until the lawful proprietor shall have had time to take measures for

possessing himself of the same; and in case any dispute should arise between claimants to the same succession, as to the property thereof, the question shall be decided according to the laws, and by the judges, of the country in which the property is situated.

ARTICLE II.

If by the death of a person owning real property in the territory of one of the high contracting parties such property should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, such term as the laws of the State or country will permit shall be allowed to him to dispose of such property, and collect and withdraw the proceeds thereof, without paying to the Government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which such real property may be situated.

TWO SICILIES, 1855.

ARTICLE VI.

The citizens and subjects of each of the contracting parties, residing in the States of the other, shall be entitled to carry on commerce, arts, or trade, and to occupy dwellings, shops, and warehouses, and to dispose of their property of every kind, whether real or personal, by sale, gift, exchange, or in any other way, without hindrance or obstacle. And they shall be free to manage their own affairs themselves, or to commit those affairs to persons whom they may appoint as broker, factor, or agent; nor shall they be restrained in their choice of persons to act in such capacities; nor

shall they be called upon to pay any salary or remuneration to any person whom they shall not choose to employ. Absolute freedom shall also be given, in all cases, to the buyer and seller to bargain together, and also to fix the price of any goods or merchandise, imported into, or to be exported from, the States of either of the contracting parties, save and except where the laws of the said States may require the intervention of special agents, or where, in either of the countries articles may be the subject of a government monoply, as at present in the Kingdom of the Two Sicilies, the royal monopolies of tobacco, salt, playing cards, gunpowder, and saltpetre.

ARTICLE VII.

As to any citizen or subject of either of the high contracting parties dying within the jurisdiction of the other, his heirs, being citizens or subjects of the other, shall succeed to his personal property, and either to his real estate or to the proceeds thereof, whether by testament or *ab intestato;* and may take possession thereof, either by themselves or by others acting for them; and may dispose of the same at will, paying to the profit of the respective Governments such dues only as the inhabitants of the country wherein the said property is, shall be subject to pay in like cases. And in case of the ebsence of the heir or of his representatives, the same care shall be taken of the said property as would be taken, in like cases, of the effects of the natives of the country itself; the respective Consular Agents having notice from the competent judicial authorities of the day and hour in which they will proceed to the imposing or removing of seals and to the making out of an inventory, in all cases where such proceedings are required by law; so that the said Consular Agent may assist thereat.

The respective Consuls may demand the delivery of the hereditary effects of their countrymen, which shall be immediately delivered to them, if no formal opposition to such delivery shall have been made by the creditors of the deceased, or otherwise, as soon as such opposition shall have been legally overruled. And if a question shall arise as to the rightful ownership of said property, the same shall be finally decided by the laws and judges of the land wherein the said property is. And the citizens and subjects of either of the contracting parties in the States of the other, shall have free access to the tribunals of justice of said States, on the same terms which are granted by the laws and usages of the country to native citizens or subjects; and they may employ, in defence of their interests and rights, such advocates, attorneys, and other agents, being citizens or subjects of the other, as they may choose to select.

HAYTI, 1864, ART. IX.

The citizens of each of the high contracting parties, within the jurisdiction of the other, shall have power to dispose of their personal property, by sale, donation, testament, or otherwise; and their personal representatives, being citizens of the other contracting party, shall succeed to their personal property, whether by testament or *ab intestato*. They may take possession thereof, either by themselves or by others acting for them, at their pleasure, and dispose of the same, paying such duty only as the citizens of the country wherein the said personal property is situated shall be subject to pay in like cases. In the absence of a personal representative, the same care shall be taken of the property as by law would be taken of the property of a native in a similar case, while the lawful owner may take measures for

securing it. If a question as to the rightful ownership of the property should arise among claimants, the same shall be determined by the judicial tribunals of the country in which it is situated.

DOMINICAN REPUBLIC, 1867, ART. V.

The citizens of each of the high contracting parties, within the jurisdiction of the other, shall have power to dispose of their personal property by sale, donation, testament, or otherwise; and their personal representatives, being citizens of the other contracting party, shall succeed to their personal property, whether by testament or *ab intestato*. They may take possession thereof, either by themselves or by others acting for them, at their pleasure, and dispose of the same, paying such duty only as the citizens of the country wherein the said personal property is situated shall be subject to pay in like cases. In the absence of a personal representative, the same care shall be taken of the property as by law would be taken of the property of a native in a similar case, whilst the lawful owner may take measures for securing it. If a question should arise among claimants as to the rightful ownership of the property, the same shall be finally decided by the judicial tribunals of the country in which it is situated.

When on the decease of any person holding real estate within the territory of one party, such real estate would by the law of the land descend on a citizen of the other, were he not disqualified by alienage, the longest term which the laws of the country in which it is situated will permit shall be accorded to him to dispose of the same; nor shall he be subjected, in doing so, to higher or other dues than if he were a citizen of the country wherein such real estate is situated.

III.

Copies of clause in above specimen Treaties together with the version in the Respective Foreign Language.

BAVARIA, 1845, ART. V.

9 U. S. St., p. 11.

If any dispute should arise between different claimants to the same inheritance, they shall be decided in the last resort, according to the laws, and by the judges of the country where the property is situated.

Wenn sich Streitigkeiten zwischen verschiedenen rechtlichen Anspruch auf die Erbschaft habenden Prätendenten erheben, so werden dieselben in letzer Instanz nach den Gesetzen und von den Richtern des Landes entschieden werden, in welchem das Object der Erbschaft sich befindet.

TWO SICILIES, 1845, ART. VI.

9 U. S. St., p. 17.

And if a question should arise among several claimants, as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land wherein the said goods are.

E laddove sorgesse quistione tra molti pretendenti per l'appartenenza de'detti beni, la stassa sarà decisa diffinitivamente, secondo de leggi e da'giudici des paese ove si trovano i detti beni.

SAXONY, 1845, ART. V.

9 U. S. St., p. 42.

If any dispute should arise between the different

Wenn sich irgend eine Streitigkeit zwichen ver-

claimants to the same inheritance, they shall be decided according to the laws and by the judges of the country where the property is situated.

schiedenen dieselbe Erbschaft beansprechenden Personen erheben sollte, so soll dieselbe in Gemässheit der Gesetze und durch die Richter desjenigen Staats worin sich die Güter befinden, entschieden werden.

NASSAU, 1846, ART. V.

9 U. S. St., p. 50.

If any dispute should arise between different claimants to the same inheritance, they shall be decided, in the last resort, according to the laws and by the judges of the country where the property is situated.

Wenn sich Streitigkeiten zwischen verschiedenen, rechtlichen Anspruch auf die Erbschaft habenden Praetendenten erheben, so werden dieselben in letzter Instanz nach den Gesetzen und von den Richtern des Landes entschieden werden, in welchen das Object der Erbschaft sich befindet.

HANOVER, 1846, ART. X.

9 U. S. St., p. 63.

If any question should arise among several claimants to which of them the said property belongs, the same shall be finally decided by the laws and judges of the country wherein it is situate.

Wenn swischen verschiedenen Präetendenten Streit darüber entstehen sollte, wem von ihnen das besagte Vermögen gehöre, so soll selbiger nach den Gesetzen und durch die Richter des Landes, worin selbiges sich befindet, definitiv entschieden werden.

MECKLENBURG, &c., 1846, ART. X.

9 U. S. St., p. 76.

If any question should arise among several claimants to which of them the said property belongs, the same shall be finally decided by the laws and judges of the country wherein it is situated.

Wenn swischen verschiedenen Präetendenten Streit darüber enstehen sollte, wen bon ihnen das besagte Vermögen gehöre, so soll selbiger nach den Gesetzen und durch die Richter des Landes, worin selbiges sich befindet, definitive entscheiden werden.

SWITZERLAND, 1847, ART. I.

9 U. S. St., p. 100.

and in case any dispute should arise between claimants to the same succession, as to the property thereof, the question shall be decided according to the laws, and by the judges, of the country in which the property is situated.

et dans le cas ou s'éléverait une question parmi les prétendans à une succession de savoir à qui les biens doivent appartenir, cette question sera décidée après les lois et par les juges du pays dans lequel les biens se trouvent.

SWITZERLAND, 1850, Art. VI.

11 U. S. St. at Large, 591.

Any controversy that may arise among the claimants to the same succession, as to whom the property shall belong, shall be decided according to the laws and by the judges of the country in which the property is situated.

Les contestations qui pourraient s'élever entre les prétendans à une succession, sur la question de savoir à qui les biens doivent appartenir, seront portées devant les tribunaux et juges d'après les lois du pays dans lequel la propriété est située.

BRUNSWICK, &c., 1854, Art. I.

11 U. S. St. at Large, 602.

And in case any dispute should arise between claimants to the same succession, as to the property thereof, the question shall be decided according to the laws, and by the judges, of the country in which the property is situated.

Und sollten Streitigkeiten wegen der nachgelassenen Güter Zwischen Personen welche Erben zu sein beanspruchen, entstehen, so sollen dieselben nach den Gesetzen und von den Richtern des Landes entschieden werden, in welchem das Object der Erbschaft sich befindet.

TWO SICILIES, 1855, Art. VII.

11 U. S. St. at Large, 644.

And if a question shall arise as to the rightful ownership of said property, the same shall be finally decided by the laws and judges of the land wherein the said property is.

Laddove poi sorgesse quistione sulla spettanza di tali beni, la stessa sara decisa diffinitivamente, secondo le leggi, e da Giudici del paese dove essi sono situati.

HAYTI, 1864, Art. IX.

13 U. S. St. at Large, 714.

If a question as to the rightful ownership of the property should arise among claimants, the same shall be determined by the judicial tribunals of the country in which it is situated.

Si, parmi les prétendants, il s'éleve une contestation sur la legitimité de leur droit respectif a la propriét cette contestation sera jugée par les tribunaux de justice du pays où le bien est situé.

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DOMINICAN REPUBLIC, 1867, Art. V.

15 U. S. St. at Large, p. 170.

If a question shall arise among claimants as the rightful ownership of the property, the same shall be finally decided by the judicial tribunals of the country in which it is situated.

Si, se suscitare cuestion entre los reclamantes sobre la legitima propiedad de los bienes, aquella sera definitivamente decidída por los tribunales de justicia del pais donde se hallaren estos situados.

IV.

Hawaiian Statute of Distributions and Final Disposition of Insurance monies paid in Administrator's action.

Hawaiian Statute of Distributions.

COMPILED LAWS OF THE HAWAIIAN KINGDOM.
[1889.]

CHAPTER XXXII.

OF THE DESCENT OF PROPERTY, BOTH REAL AND PERSONAL.

§ 1447. Whenever any person shall die intestate within this Kingdom, his property, both real and personal, of every kind and description, shall descend to and be divided among his heirs, as hereinafter prescribed.

§ 1448. The property shall be divided equally among the intestate's children, and the issue of any deceased child by right of representation, and if there is no child of the intestate living at his death, his estate shall descend to all his other lineal descendants.

IN RE ESTATE OF HENRI MCGREW.

On January 23, 1897, J. O. Carter, Administrator of Estate of H. G. McGrew, filed accounts and petitioned for a discharge.

His accounts show, among other receipts, the following:

"1896, December 19. Avails of Life Insurance Policy, $5,000."

All other receipts, including balance from old account of $56.68, amounted to $1,032.27.

Among expenditures there appears the following item:

"1896. May 11, By paid Mrs. McGrew's order, support of minor, $100."

The memo. of property on hand for delivery is as follows:

"The Administrator has in his hands for delivery to "Guardian of minor, when appointed:

"Haw. Govt. Bond, No. 472, 6%.....	$1,000 00
" do. 19.....	500 00
"Wailuku Sugar Co. bond, No. 144, 6%.....	1,000 00
"Cash in Bishop & Co.'s Bank.....	4,862 53
	$7,362 53

In the inventory of property filed by the Administrator was "Insurance Policy Mutual Life of New York, $5,000."

On March 19, 1897, the Probate Court approved the accounts and ordered the discharge of the Administrator "upon his filing the final receipt to be signed by the duly appointed Guardian of R. Brodie McGrew, the minor child and sole heir of said decedent H. G. McGrew."

The formal order concerning the heir is as follows:

"And that the said administrator do deliver over the "property remaining in his hands to the person herein-"after named. * * * The person entitled is as follows "with the respective places of residence, age, and sex: "Reynold Brodie McGrew, a minor, son of said decedent, "and now residing in San Francisco, California, U. S. "A."

On June 1st, 1897, Carter, Administrator, in writing, informed the Probate Court that no guardian had been appointed for said R. B. McGrew and asked to be allowed to pass over the estate into Court. The Court so ordered on June 3, 1897, and the Clerk of the Court, Henry Smith, receipted for the list of property above enumerated.

Later, on August 31, 1897, Chas. B. Cooper was appointed guardian of Reynold Brodie McGrew, and on September 2, 1897, receipted to said Henry Smith for said funds and property, less certain expenses, amounting to the net sum of $7,281.15.

On August 5, 1899, Cooper, guardian, filed accounts showing receipts of income from above-described property, $978.93, and expenditures, $980.56. Principal in hand, $7,600.

On March 25, 1901, further account filed showing receipts, $869.45; expenditures, $639.72. Value of estate in hand, $7,829.40.

Both accounts approved by Probate Court.

V.

Letter from French Counsel on Language Treaty.

234 Faub'g. St. Honoré.
5. 7. 1902.

Je me suis renseigné sur la jurisprudence relative á l'interprétation de la clause, que vous avez bien voulu me soumettre, du traité de 1850 entre les Etats-Unis et les Iles Hawai.

Cette clause est ainsi conçue: "And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and judges of the land therein the said goods are." Je la traduis ainsi: "Et si une contestation s'élevait entre plusieurs prétendants à la propriété de ces biens, elle serait jugée en dernier ressort conformément aux lois et par les juges du pays où *sont* lesdits biens."

Au Ministère des Affaires étrangères, on n'a été en mesure de me fournir aucune indication utile. *Je me suis adressé, en outre, à monsieur André Weiss, Professeur de Droit international privé à l'Université de Paris*, qui a, en ces matières, une grande compétence et une grande autorité. Pas plus que moi, il ne connait ni jugement, ni arrêt rendu en France sur ce sujet, ce qui n'est, d'ailleurs pas surprenant, aucun de nos traités internationaux ne renfermant de clause similaire. Pour le règlement des successions, nous stipulons toujours, dans nos conventions diplomatiques, l'application du statut réel, c'est-à-dire de la loi territoriale par les tribunaux indigènes, pour les immeubles,—et du statut personnel, c'est-à-dire de la loi nationale du "de

cujus" par les tribunaux de son domicile, pour les meubles et les valeurs mobilères.

Le mot "*goods*," que j'ai traduit par "*biens*," a plus spécialement, dans le droit successoral anglais, le sens de "movable property," par opposition à "lands, tenements and hereditaments;" je suppose, cependant, que, dans la clause envisagée, il a le même sens générique que notre mot "biens" et doit s'entendre de toute sorte de propriété, mobilière ou immobilière.

Ainsi compris, nous pensons, M. Weiss et moi, que si nos tribunaux avaient à statuer sur la clause, leur interprétation sur le principe ne serait guère douteuse. Le clause contient erga omnes une attribution formelle de législation et de compétence juridictionelle; l'unique criterium semble devoir être la situation *matérielle* des biens.

Pour les immeubles et les meubles corporels, il n'y aurait pas de difficulté, la succession serait dévolue et réglée suivant les lois et par les juges du pays où ils sont situés au moment du décés. Pour les *créances* non représentés par un titre, le domicile du débiteuf serait considéré comme le lieu de la situation. Pour les valeurs résultant de titres, l'hésitation serait possible entre le lieu où existeraient les titres et celui du siège social du débiteur; cependant, nous opterions pour le premier, surtout si le débiteur y possédait une succursale où le paiement put être exigé. Il est bien entendu que le Traité ne s'applique qu'aux biens existant soit aux Etats-Unis, soit aux Iles Hawaï; pour ceux qui se trouveraient dans des pays étrangers au traité de 1850, le droit commun reprendrait son empire.

(Signed) LOUIS AYRAL.

Translation.

234 Faubg. St. Honoré,
July 5th, 1902.

I have obtained information as to judicial decisions upon the interpretation of the clause in the Treaty of 1850 between the United States and the Hawaiian Islands, which you have been kind enough to submit to me.

Said clause is worded thus:

> "And if a question should arise among several claimants as to which of them said goods belong, the same shall be decided finally by the laws and the judges of the land therein the said goods are."

which I translate thus:

> "Et si une contestation s' élevait entre plusieurs prétendants à la propriété de ces biens, elle serait jugée en dernier resort conformément aux lois et par les juges du pays où *sont* les dits biens."

I have not been able to get any useful points from the Ministry of Foreign Affairs, where I applied. *I have also applied to my friend André Weiss, Professor of Private International Law at the University of Paris, who is highly competent in these matters, and enjoys a great reputation as such.* This gentleman does not know, any more than I do, of any judgment or decision existing in France on this subject, which, by the way, is not surprising, as none of our international treaties contains any such clause. As regards the settlement of inheritances we always stipulate in our diplomatic agreements that the *statut réel*, that is, the territorial law, should be applied by legal tribunals in the case of real estate, whereas the *statut personnel*, that is, the national law of the *de cujus*, should be applied by the

tribunals of the place where he resides, in the case of personal property and values.

The word "goods," which I have translated by "biens," has, more specially in that part of the British law regulating inheritances, the meaning of "moveable property" in opposition to "lands, tenements and hereditaments." I suppose, however, that in the clause above referred to it has the same generic sense as our word "biens," and should be understood to signify any species of property either personal or real.

Under the circumstances, Mr. Weiss and I think that if our tribunals should be called upon to construe the clause, their interpretation, upon principle, is hardly open to doubt. The clause contains, *erga omnes* a formal legislative provision and a grant of jurisdiction; the only criterion, it seems, ought therefore to be as to where the goods are *materially* located.

As regards real estate and corporeal personal property, there would be no difficulty, the inheritance would be settled according to the laws and through the instrumentality of the judges of the land where they are located at the time of the demise. As regards debts not represented by a document of title, the domicile of the debtor would be considered as the location. Regarding securities represented by documents of title there may be room for discussion between the place where the said documents are found and the place where the debtor's business domicile is located; we should, however, decide in favor of the former, especially if the debtor had there a branch office at which the payment could be demanded. It goes without saying that the treaty applies only to goods existing either in the United States or in the Hawaiian Islands. As regards those which should exist in lands not named in the Treaty of 1850, common law would resume its sway.

LOUIS AYRAL.